REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS.

BY

GEORGE MAULE and WILLIAM SELWYN, Esqrs.

OF LINCOLN'S INN, BARRISTERS AT LAW.

Sit ergo in jure civili finis hic, legitimæ atque usitatæ in rebus causisque civium æquabilitatis conservatio. CICERO.

VOL. V.

Containing the Cases of EASTER, TRINITY, and MICHAELMAS Terms, in the 56th and 57th Years of GEORGE III. 1816.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, 43. FLEET-STREET; AND J. COOKE, ORMOND-QUAY, DUBLIN.

1823.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD LORD ELLENBOROUGH, C. J.
Sir JOHN BAYLEY, Knt.
Sir CHARLES ABBOTT, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.

ATTORNEY-GENERAL.

Sir WILLIAM GARROW.

SOLICITOR-GENERAL.

Sir SAMUEL SHEPHERD.

ERRATA.

Page 408. line 12. for "rule discharged," read "rule absolute."
503. in marginal note, for "abassador," read "ambassador."
504. in marginal note, read "imputable to the arbitrator."

A

TABLE

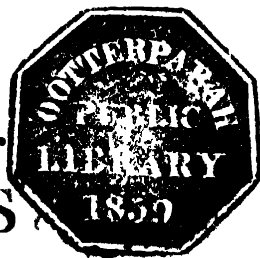
OF THE

CASES REPORTED

IN THIS FIFTH VOLUME.

Chattaway,

Rex



CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-sixth Year of the Reign of GEORGE III.

1816.

MEMORANDA.

IN the last vacation, *George Sowley Holroyd*, Esq. was called Serjeant, and gave for his motto "*Componere legibus orbem,*" and was appointed to succeed the late Mr. Justice *Dampier* as one of His Majesty's Justices of the Court of King's Bench, and was afterwards knighted.

On Monday the 15th of *April*, Mr. Justice *Le Blanc* died at his house in *Bedford Square*:

"*Illo nemo neque integrior erat in civitate, neque sanctior.*"

In the course of the last vacation Mr. Serjeant *Vaughan* was appointed Solicitor General to Her Majesty, and *William Harrison*, Esq. Solicitor to the Prince of *Wales*.

1816.

On *Wednesday* the 1st of *May*, being the first day of this term, the following gentlemen took their seats within the bar, viz. Mr. Serjeant *Vaughan* having been appointed one of His Majesty's Serjeants learned in the law; *James Burrough*, *Charles Warren*, *Jonathan Raine*, *James Scarlett*, *James Trower*, *William Cooke*, *Samuel Yate Benyon*, *William Agar*, and *John Bell*, Esquires, having been appointed of His Majesty's counsel learned in the law; *Charles Wetherell*, Esq. having received a patent of precedence, and *William Harrison*, Esq. having been appointed one of His Majesty's counsel learned in the law.

On *Friday* the 3d of *May*, Mr. Justice *Abbott* took his seat on the bench of this Court, having resigned his seat on the bench of the Court of Common Pleas. And on *Saturday* the 4th of *May*, *James Burrough*, Esq. was called Serjeant, and gave for his motto, "*Legibus emendes*," and was appointed to succeed Mr. Justice *Abbott* as one of His Majesty's Justices of the Court of Common Pleas, and took his seat accordingly, and was afterwards knighted.

Wednesday, *May* 1st.

RANGER *against* the Earl of CHESTERFIELD.

If a bond and warrant of attorney and indenture be made to secure an annuity, the memorial of the bond and warrant of attorney, need not express for whose life the annuity is granted, if it be expressed in the memorial of the indenture, which recites the said bond and warrant of attorney, for whose life the said annuity is granted.

A MEMORIAL of an annuity granted by the Earl of *Chesterfield* to one *John Taylor*, on the 10th of *February* 1781, set forth a bond of that date made by the Earl to *Taylor*, in the penal sum of 3600*l.* conditioned for the payment of an annuity of 300*l.* quarterly,

1816.

RANGER *against* The Earl of CHESTERFIELD.

in consideration of 1800*l.* paid by *Taylor* to the Earl; also a warrant of attorney of the same date to confess a judgment on the said bond for 3600*l.*; also an indenture of the same date between the Earl of the 1st part, *Taylor* of the 2d, and *T. Stride* of the 3d, reciting the said bond and warrant of Attorney, and that for the better securing the said annuity the Earl had agreed to charge the said annuity on certain manors, &c. (described in the memorial), in pursuance whereof the Earl bargained and sold to *Taylor*, his executors, &c. a rent charge of 300*l.* payable out of the manors, &c. (setting forth the parcels); *habendum* to *Taylor*, his executors, &c. from thenceforth during the life of the Earl, payable quarterly, on the days therein mentioned, and for more effectually securing the same the Earl, in consideration of 5*l.* paid by *Stride*, granted to him, his executors, &c. the said manors, &c. *habendum* to *Stride*, his executors, &c. for 99 years, if the Earl should so long live, in trust, &c. (setting forth the trusts in the terms of the deed as above stated). And because the memorial of the bond and warrant of attorney did not specify for whose life the annuity was granted, nor by whom or to whom the same was payable, (but in the condition of the bond it was specified, that the annuity was granted during the Earl's life, and was payable by him, and that *Taylor* had contracted with him for the purchase of it) therefore it was objected by the Earl, in his answer to a bill filed in Chancery for the purpose of obtaining payment of the arrears, that the said annuity was invalid.

And now this question being referred by the Master of the Rolls to this Court for their opinion,

1816.

RANGER *against* The Earl of CHESTERFIELD.

Richardson for the defendant argued (*a*) from the language of the annuity act (*b*), which requires, "that a memorial of *every deed*, *bond*, &c. whereby any annuity, &c. shall be granted, shall within 20 days of the execution of *such* deed, bond, &c. be enrolled, and that every such memorial shall (*inter alia*) set forth the name of the person for whose life the annuity is granted, otherwise every such deed, bond, &c. shall be void," that the memorial of this bond was defective, *causâ quâ supra*. For when the statute saith *every such memorial*, it means the *memorial of every such deed*; otherwise why make every such deed void? And this defect is not cured by the recital of the bond, in the memorial of the indenture; for if the memorial of the indenture had fully recited the condition of the bond, viz. that it was for an annuity granted during the Earl's life, &c. possibly the defect in the memorial of the Bond might have been supplied by the recital of it in the memorial of the indenture; but here, neither the memorial of the bond, nor the recital of it in the memorial of the indenture, states that it is for an annuity during the Earl's life. So that there is no way of learning from the memorial, what is the term mentioned in the bond for which the annuity is granted.

Lord ELLENBOROUGH C. J. Did the act of parliament mean to enforce a separate setting forth of each of the several instruments; or is it not a sufficient compliance with the act in this case, to set forth that instrument which shews the other two, and simply to state the fact that there are the other two? The expression

(*a*) This case was argued at Serjeants' Inn before this term. We were favoured with a note of the argument by a gentleman at the bar.

(*b*) 17 G. 3. c. 26. § 1.

"*said*

1816.

RANGER *against* the Earl of CHESTERFIELD.

"*said* annuity," in the memorial of the indenture, sufficiently identifies the annuity with that for which the bond and warrant of attorney are given; so that there is a complete notification of every deed: and upon the whole it appears, that all are given in respect of the same annuity. So much ingenuity has been expended upon the construction of this act, that doubts have been raised where they could never otherwise have arisen.

BAYLEY J. I think this case is decided by that of *Hodges* v. *Money*. (*a*)

Marryat was to have argued for the plaintiff.

The following certificate was sent:

We have heard this case argued by counsel, and have considered it; and we are of opinion, that the annuity of 300*l*. granted by the defendant, the Earl of *Chesterfield*, to the said *John Taylor*, was a good and valid annuity.

ELLENBOROUGH.
J. BAYLEY.
G. S. HOLROYD.

(*a*) 4. *T. R.* 500

Wednesday, May 1st.

A policy on freight, at and from the ship's port of loading at J. to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading, as aforesaid, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of goods loaded at an intermediate port; and therefore where the ship having sailed with a cargo loaded at J. was during the voyage cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge, and earned freight, held that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expences attendant upon procuring the said freight.

BARCLAY, *against* STIRLING and Another. (a)

ASSUMPSIT for money lent, money paid, and money had and received to the use of the plaintiff, and upon an account stated. Plea general issue, and the defendants paid 75*l.* into *Court*, upon the count for money had and received. At the trial before Lord *Ellenborough* C. J. at the *London* sittings, after *Trinity* term, there was a verdict for the plaintiffs, damages 500*l.* subject, to the opinion of the *Court*, upon the following case:

The defendants being owners of the ship *Neptune*, which was loaded at *Jamaica* in *September* 1814, with a cargo on freight from various shippers, and was bound to *London*, effected a policy of insurance for 1200*l.* on the freight of the said ship, valued at 4,200*l.* which policy the plaintiff underwrote for 500*l.* The voyage described in the policy was, "*At and from port or ports of loading in* Jamaica, *to her port or ports of discharge of the* United Kingdom, *with leave to call at all, any, or every one of the* British *and foreign* West India *islands, to seek, join, and exchange convoy, beginning the adventure upon the goods from the loading thereof aboard the said ship, as aforesaid.*" And in a subsequent part of the policy, after the usual declaration, that it should be lawful for the ship, in that voyage, to

(a) This case was argued at *Serjeants' Inn*, before this term.

proceed

proceed and sail to, and touch and stay at any ports whatsoever, the following words were introduced:— "*And wheresoever, with leave to discharge, exchange, and take on board goods at any ports or places she may call at, or proceed to, without being deemed any deviation from, and without prejudice to this insurance.*"

The ship sailed from *Jamaica* on the 30th of *October*, 1814, with the said cargo; and on the 8th of *November*, in the course of her voyage, got on shore off the island of *Cuba*. There she remained till the 18th of *December*, during which time part of the cargo was saved, but the greater part, consisting of sugar, was washed away and lost. On the 20th of *December*, the ship reached the *Havannah*, and having received there such repairs as were necessary to enable her to proceed to *England*, took on board so much of her cargo as had been saved, and likewise a considerable quantity of fresh goods on freight, from the *Havannah* to *London*, and sailed the latter end of *February* 1815. Intelligence of the disaster which had befallen the ship, was conveyed to the defendants on the 18th of *January* 1815, by a letter dated *Havannah*, the 23d *November* preceding, which letter was shewn to the plaintiff and the other underwriters. This letter stated "that the ship on her passage home, in the convoy of the *Argo* frigate, had been cast on shore on the coast of *Cuba*, in heavy weather, on the night of the 8th of *November*, about 25 miles to leeward of the *Havannah*. That the captain on his arrival there had applied for assistance, and had ever since been employed in procuring coasters and men; and that part of the cargo which it had been possible to save, was nearly already

 secured.

1816.

BARCLAY *against* STIRLING.

secured. That about two-thirds of the cargo would be wholly lost, the water having reached up to the middle deck before assistance could be procured. That there were some hopes that the vessel would be saved, but it was precarious, and depended much upon the weather; but no exertion would be spared for that purpose. In the mean time the proceedings and vouchers went on with the utmost regularity, and the defendants would be regularly informed of their progress." On receipt of this letter the defendants abandoned the freight, by notice in writing, to the plaintiff and the other underwriters on freight, and also abandoned the ship to the several underwriters on ship, and demanded from all a total loss. Most of the underwriters on ship adjusted a total loss, but afterwards settled with the defendants by compromising to pay less than 100*l.* per cent., the underwriters giving up to the defendants their interest under the abandonment. The plaintiff refusing to pay a total loss, an action was commenced against him on the 26th of *January* 1815, and on the 28th, after process delivered to his attorney, the plaintiff agreed to settle a total loss, and thereupon signed an adjustment on the policy in this form: "Settled a total loss of 100*l.* per cent., payable in a month." On the 16th of *February*, the plaintiff being informed that the ship had been gotten off the rocks, and was about to be repaired and sent to *England*, gave notice to the broker not to pay over to the assured the loss which he had settled, but withdrew that notice on the 22d of *April*, so soon as it was known that the ship had arrived in the *British* Channel, and authorized the broker to pay the defendants the total loss, which was accordingly

paid.

paid. On the 3d of *May* the ship arrived at the port of *London*, and having duly delivered her cargo, the defendants received freight for the same. It was agreed that, as far as concerned the verdict, the 75*l.* paid into Court should be taken as sufficient to cover the freight due for that part of the cargo delivered, which was originally shipped at *Jamaica*. And the question was, 1st, whether the plaintiff was entitled to a proportion of the whole or to any part of the freight of the fresh goods shipped at the *Havannah* and delivered in *London*; and if so, 2dly, whether any deductions from the gross amount of such freight were to be made in respect of charges incurred at the island of *Cuba*.

Richardson, for the plaintiff, argued, that inasmuch as the freight of the goods shipped at the *Havannah*, was covered by the policy, the plaintiff was entitled to this freight. He said, it was clear from the terms of the policy, that it included freight not only of such goods as were shipped at *Jamaica*, but also of all goods put on board at any of the *West India* islands in the course of the voyage; for the policy contained a liberty to call at any such islands, and to discharge, exchange, and take on board goods at any place the ship might call, without being deemed a deviation, &c. If then the freight of such goods was covered by the policy, it followed, from the abandonment, that the plaintiff was entitled to such freight; because the abandonment implies a relinquishment to the abandonee of all the interest covered by the policy. Therefore, where freight was earned after abandonment, and received by the assured from the shippers of goods, it was adjudged that the underwriter on freight might have

1816.

BARCLAY *against* STIRLING.

have *assumpsit* to recover it from the assured. (*a*) And at all events, whether the plaintiff be entitled to this freight under the abandonment or not, this being a contract of indemnity, he is entitled to have the damages recouped, *pro tanto*, out of the freight earned by the defendants in the homeward voyage. (*b*) 2dly, As to any deductions from the amount of this freight in respect of charges incurred at the *Havannah*, it seems that the expences of the voyage, wages, &c., are charges which belong to the owner of the ship, and are not, properly speaking, salvage on the freight, and therefore ought not to fall upon the plaintiff.

Marryat, for the defendants, denied that the freight of the goods shipped at the *Havannah* was covered by the policy; for the policy is precise in describing the adventure to be, "at and from her ports of loading in *Jamaica*;" and that it shall begin "from the loading of the goods aboard *as aforesaid*," that is at *Jamaica*; and the leave given in a subsequent part of the policy to exchange and take on board goods at any places the ship might call at, was not intended to alter the adventure before described, but only to excuse a deviation. Therefore, though the loading of goods at the *Havannah* shall not avoid the policy, by reason of the liberty contained in it, yet is it no part of the risk insured. If the whole cargo had been loaded in the first instance at the *Havannah*, there would have been no inception of the risk; how then does the loading of a part at *Jamaica* alter the nature of the risk, as to that part which was loaded at the *Havannah*? Another

(*a*) 4 *East*. 34. *Thompson* v. *Rowcroft*, 3 *B & P*. 479. *Leatham* v. *Terry*.
(*b*) 11 *East*. 232. *Puller* v. *Staniforth*.

objection

objection to the plaintiff's right to recover, is this, that having paid his money voluntarily, and with knowledge of all the circumstances, as upon a total loss, to the assured, it is against a known principle of law to permit him to recover it back.

1816.

BARCLAY *against* STIRLING.

Lord ELLENBOROUGH, C. J. This is a question between the assured and the underwriter on freight, to whom an abandonment has been made, whether the underwriter is entitled to recover the freight earned subsequently to the abandonment and received by the assured under these circumstances. The freight was earned in respect of goods loaded partly at *Jamaica*, and partly, owing to a mis-adventure in the voyage, at *Cuba*; and the whole has been received by the assured at the ship's port of discharge. First, let us consider the freight insured. The policy runs thus: "At and from the port of loading in *Jamaica*, to her port of discharge, beginning the adventure from the loading on board the ship as aforesaid, that is, from the loading at *Jamaica*, with leave to call at all and every of the *West India* islands." The ship being driven on the coast of *Cuba* by the accidents of the voyage, this became a part of the voyage. And without considering it as part of the voyage in the first instance, the liberty given to the assured to touch and take in goods at *Cuba*, incorporates this part of the adventure, by necessary construction, with the voyage. It is said, this liberty does no more than excuse a deviation; but the case of *Violett* v. *Allnutt* (*a*), shews that an intermediate port may be included within the policy, equally with the *terminus a quo* mentioned in it:

(*a*) 3 *Taunt.* 419.

1816.

BARCLAY *against* STIRLING.

it: and it is very material that it should be so. This then being freight, which the policy would have covered, had it remained at the risk of the assured, is not the assured a trustee for the underwriter if he receive it after abandonment? All the cases agree that he is, and that he is accountable for the subsequently received freight: he cannot have both indemnity and freight also. Therefore the plaintiff is entitled in this case, deducting only such charges as belong to the freight; such as the expences of loading the cargo, and the wages of the crew during the loading. (*a*)

BAYLEY J. The question is, whether the plaintiff is entitled to the whole, or any part of the *Havannah* freight. The first objection is, that this policy would only have attached on the freight of such goods as were put on board at *Jamaica*, but not elsewhere. But such a construction is contrary to the true intent of the policy; for the policy contains no words limiting it to the goods to be put on board at *Jamaica*. The two *termini* were *Jamaica*, and the ship's port of discharge in the *United Kingdom*, with leave to call at any of the *West India* islands; and I think, that any freight earned between these two *termini*, and within the limits of the leave specified, would have been covered by the policy. In a subsequent part of the policy, there is leave given to discharge, exchange, and take on board goods at any place the ship may call at: this was not to be deemed a deviation. Then, if the assured were to have full power to do this, how comes it that the freight of the goods thus taken on board, is not to be included in the policy? The underwriter's

(*a*) See *Sharp* v. *Gladstone*, 7 *East*. 24.

risk

1816.

BARCLAY *against* STIRLING.

risk is not increased by the assured's taking on board one half of the cargo at *Jamaica*, and the other half at *Cuba*, when he might have taken on board the whole at *Jamaica*; on the contrary, the risk is thereby diminished. For suppose, in this case, a loss to have happened before the ship was fully laden, the underwriter would have sustained a loss but upon half his risk. In principle and good sense, there can be no reason why this policy, which was intended to cover the freight upon the whole voyage, should not attach upon the freight of goods loaded at an intermediate port in the voyage. I therefore think that the *Havannah* freight was covered by the policy. It would be unjust to hold otherwise. The assured estimates the whole freight at 4,200*l.*: if one-half is washed overboard, and a fresh half substituted, why should he be allowed to earn the freight of that half, and put it into his pocket? With respect to the abandonment, the import of it is, that the assured declares that he does not look to any benefit from the freight of the voyage, but is content that the underwriter shall have it, paying to the assured the full 100 per cent. And this action is not brought to recover back from the assured any part of that money which was paid him by the underwriter, but to recover that portion of the freight which the assured has received, after having been paid the full amount of his freight. As to whether any deductions ought to be made, I think that the charges incurred while the ship was detained merely for the purpose of getting repairs, to enable her to complete her voyage, ought to be set to the account of loss on ship, for which the underwriter on ship will be liable. But as to any charges incurred while the ship waited at *Cuba* to obtain freight,

or

1816.

BARCLAY *against* STIRLING.

or for the purpose of loading it when obtained, these ought, I think, to be deducted.

HOLROYD J. This is a policy not confined to freight on goods loaded at *Jamaica*, but is to be extended to goods loaded during the voyage from *Jamaica* to her ports of discharge. The leave to call at other ports, and load there, puts the freight arising from the goods loaded at the *Havannah*, upon the footing with the former freight, and brings it within the meaning of the policy. I agree with the *Court* on the other point.

Postea to the Plaintiff.

Wednesday, May 1st.

CHAPLIN, Clerk, *against* LEROUX. (*a*.)

Devise of his estates to his wife for life, and after her decease, to his son (his heir at law), charged with the yearly payment of 100*l*. to his daughter for her life, and at her decease with the sum of 1500*l*. to be divided among her children; or if no child, to be disposed of as she should direct; and in default of payment of either of the said sums within the time appointed, to *G. T.*, his heirs, administrators, and assigns, in trust, to raise the 100*l*. out of the rents and profits, and the 1500*l*. by sale or mortgage of a sufficient part of the lands, and subject to the said charges and trust to his said son, his heirs, executors, administrators, and assigns: Held, the son took by descent and not by purchase.

COVENANT for not repairing, on a lease for 21 years, which expired at *Lady Day*, 1807, made by the father of the plaintiff to the defendant. And the plaintiff declares, that his father was seised of part of the demised premises in fee, and of the residue, by copy of court roll held of the Manor of *Tottenham* in fee-simple, at the will of the Lord, according to the custom of the *Manor*: that he surrendered the copyhold part to the use of his will, and by his will devised the whole premises to his wife for life, provided she did not marry; and died seised, leaving his said wife, and the plaintiff, his only son and heir at law, him

(*a*) This case was argued at Serjeants' Inn before this Term.

surviving;

surviving; and that afterwards, and before the breach of covenant, the said wife died, and the said demised premises, with the appurtenances, *descended to the plaintiff, as only son and heir at law of the lessor*, whereby the plaintiff was, and continually hitherto hath been, and still is seised, &c.

1816.

CHAPLIN *against* LEROUX.

Plea, that the demised premises, with the appurtenances, did not descend to the plaintiff as the only son and heir at law of the lessor, *modo et formâ*.

On the trial, at the sittings after last *Trinity* term, a verdict was found for the plaintiff, subject to the opinion of the Court, on the question whether the plaintiff took by descent, or by devise under the will of his father, by which the father devised all his lands, as well freehold and leasehold, as copyhold, with their appurtenances, unto his wife for life, provided she did not marry, with power to grant building leases for 61 years, charged during that time with the payment of the yearly sum of 50*l.* to his son, the plaintiff, if he should so long live, by four equal quarterly payments, and also finding him in board, washing, and lodging during his stay at the university, and during his studies in the profession of the law in *London* or otherwise, until such time as he should arrive to the age of 27 years; and also charged with the payment of the further yearly sum of 30*l.*, during his wife's life, unto his daughter *Sarah*, the wife of *George Thompson*, if she should so long live, and payable quarterly; and in case his said wife should marry, then and from the time of such marriage he devised all his said lands unto his said son, charged with the payment of the

said

1816.

CHAPLIN *against* LEROUX.

said yearly sum of 30*l.* unto his daughter *Sarah*, in like manner as if his wife had not married; and also charged with the payment of the yearly sum of 100*l.* to his wife during her life, payable quarterly; and from and after the decease of his said wife, he devised his said estates unto his said son, charged with the payment of the yearly sum of 100*l.* unto his daughter *Sarah* during her life, payable quarterly. And upon the decease of the survivor of his wife and daughter he bequeathed the sum of 1500*l.* to be equally divided between all the children of his said daughter then living, if more than one, and if there should be only one child, then the whole to go to such child; and in case she should not have any children or child living at the time of her decease, then he gave the said sum of 1500*l.* to be disposed of by his said daughter in such manner as she should, by any deed or will attested by two witnesses, notwithstanding her present or any future coverture, appoint; and for want of such appointment the same to go to her executors and administrators. And it was his will that the said sum of 1500*l.* should be paid within one year after the decease of his wife and daughter; and in default of payment, either of the yearly sum of 100*l.* to his daughter in manner above mentioned, or of the sum of 1500*l.*, within the time above specified, he devised all his said lands, as well freehold and leasehold as copyhold, with the appurtenances, unto the said *G. Thompson*, his executors, administrators, and assigns, in trust, upon such default of payment, to raise and pay the said yearly sum of 100*l.* out of the rents and profits, and the said sum of 1500*l.* by sale or mortgage of a sufficient part of his said lands, and subject to the said several charges

charges and trust he gave the said lands, after the decease of his wife, to his said son, his heirs, executors, administrators, and assigns. The testator's said daughter is still living.

1816.

CHAPLIN *against* LEROUX.

If the Court should be of opinion that the plaintiff took by descent, the verdict to stand; if not, a nonsuit to be entered.

Gaselee for the plaintiff contended, that he took by descent: for the distinction is, that where a devise to the heir gives him the same estate as the law would have done, he shall take by descent; but where the tenure or quality of the estate is altered by the devise, he shall take by purchase. But a devise of the real estate to the heir, charged with the payment of debts (*a*) or legacies (*b*), does not break the descent, for the tenure is not thereby altered. Neither does the devise over in this case to a trustee, in default of payment of the annuity, or of the 1500*l.*, alter the nature of the estate. And therefore, where one devised lands to his wife for life, and after her decease to his next heir at law, and his or her heirs, provided such heir should pay 100*l.* within six months after the death of his wife, as the wife should by will or writing appoint, and that his lands should stand charged with the said 100*l.* (*c*); although the Court at first doubted, yet it was finally resolved that the heir took by descent and not by the will; for the proviso in the will for payment of the 100*l.* was only a charge in equity, and did not make any alteration in the estate of the land; and

(*a*) 2 *Str.* 1270. *Allam* v. *Heber. Ld. Raym.* 728. *Emerson* v. *Inchbird.*
(*b*) *Moor*, 644. *Hamsworth* v. *Pretty. Cro. Eliz.* 833. 919. S. C.
(*c*) 1 *Lutw.* 793. *Salk.* 241. S. C.

1816.

CHAPLIN *against* LEROUX.

where the estate is not altered the descent is not tolled: and it was also held, that if the testator had devised a rent charge, it would have been the same. And though there was no remainder over in that case, yet what the Chief Justice said at the close of it, according to *Lutw.* (*a*), is applicable to this case, where there is a remainder over; for the Chief Justice said, "that in all cases of executory devises the estates descend until the contingencies happen; as if a man devise to *A.*, six months after his death, in the mean time the land descends, and yet the heir hath it not merely by the law." And he said "that it would be a violent construction to make the heir in as a purchaser; and that the case of *Pitt* v. *Pelham*, 2 *Jones* 25, was a case in point." And if in the case from *Lutw.* where the devise to the heir was upon a condition precedent, provided he should pay 100*l.* within 6 months, and where, consequently, it might be doubtful whether any estate vested before payment made, nevertheless it was held that this did not alter the course of descent; *a fortiori* it is not altered by the present devise, which is upon a condition subsequent; and consequently where the estate vests, subject only to be divested by default of payment. The language of *Holt* C. J. is decisive upon this point: "If (said he) a devise be made to the heir at law, paying such and such legacies, &c. and for default thereof, remainder over, the heir until default is in by descent, and the other's interest is by way of executory devise; and so it was in *Pell* and *Brown's* case in effect." As to *Scott* v. *Scott* (*b*), it is probable that Lord Keeper Henley decided it upon the ground that the eldest son took an estate tail.

(*a*) *Lutw.* 798. (*b*) *Ambl.* 383. 1 *Eden's Rep. of Cases in Chancery. Temp. Ld. Northington*, p. 458. S. C.

Marryat,

1816.

CHAPLIN *against* LEROUX.

Marryat, contrà, argued that by the will the fee was not devised to the plaintiff until the incumbrances were satisfied, and in the mean time he took but an estate for life. That the devise over to the trustee, with a power to raise the 1500*l.* by sale, necessarily implied that the trustee was to have the fee; and that, at all all events, supposing the plaintiff took a fee in the first instance, it was a base fee, or fee determinable by the event of the incumbrances being unsatisfied. Wherefore, as the plaintiff did not take the same estate either in quantity or quality, which would by law have vested in him from his ancestor, it followed that he must take by the devise, and not by descent. Agreeably to this principle it was determined in *Scott* v. *Scott*, that the son took by devise, as having under the will a different estate than would have descended to him, the one being pure and absolute, the other not. (*a*) So, if there be a devise in fee to the heir at law, upon condition to pay debts within a year, and if he fails, that the executors shall sell and pay; this shall be a purchase in the heir at law, being tied with a condition; and so it was adjudged. (*b*)

Gaselee in reply, denied that, because a power was given to the trustee to sell for the purpose of raising the annuity and 1500*l.*, it must be necessarily intended that he was to have the fee; and this power it was competent to the heir at any time to prevent the trustee from executing. It is true that the fee which vested in the heir might be defeated by non-payment of the legacies, but so may

(*a*) *Ambl.* 383. (*b*) *Cro. Car.* 161., *Gilpin's* case.

1816.

CHAPLIN *against* LEROUX.

an estate *durante viduitate*, which is an estate for life, be defeated by marriage. And as to *Gilpin's* case it was denied to be law by *Treby* C. J. and *Powell* J. (*a*)

Lord ELLENBOROUGH C. J. If the estate devised to the trustee be an executory devise, the law will cast the estate of the heir on him by descent, until the contingency happens; if the trustee's estate be not an executory devise, I do not see that there is necessarily such an estate of freehold given to him as to break in upon and alter the quality of the estate which the heir would otherwise take.

BAYLEY J. I am of the same opinion. In all these cases it is desirable that the heir should be in by descent, rather than by purchase; because it is convenient that the property should be assets in the hands of the heir. And the general rule is, that where the heir takes the same estate in nature and quality which the law would give him, he takes by descent. It appears by Mr. *Ford's* MS. note of *Allam* v. *Heber*, though this is not noticed either in *Strange* (*b*) or *Blackstone's* (*c*) report of that case, that the Court denied *Gilpin's* case to be law. Impeached, therefore, as *Gilpin's* case is, as well by what I have just remarked, as by the authority of *Treby* C. J. and *Powell* J., it is competent to us to examine the case, and in examining it to ask this question, whether a fee mounted upon a fee turns the first into a base fee? I think that it does not. Here the plaintiff's estate was a good estate in fee, the last an executory devise.

(*a*) *Comyns*, 73. *Salk*. 241. (*b*) *Str*. 1270. (*c*) 1 *Black*. 22.

HOLROYD

1816.

CHAPLIN *against* LEROUX.

HOLROYD J. being connected with the parties declined giving any opinion.

HOFFHAM *against* FOUDRINIER. (*a*)

Wednesday, May 1st.

A covenant in an indenture made between *A.* and *B.* (assigning to *A.* 4350*l.* payable under articles of agreement by *J. S.* to *B.* by instalments) that in case the said sum, or any instalment thereof, should not be paid to *A* at the times and in the manner provided for by the articles, *B.* would, upon demand, pay to *A.* the said sum, or so much thereof as should not be paid at the times, &c. was held not to be discharged by the bankruptcy of *B.* as to any instalments accruing due after the bankruptcy: this not being a matter proveable under the commission either by *s.* 9. or *s.* 17. of 49 G. 3 *c.* 121.

COVENANT. The plaintiff declares that by indenture, of the 5th *July* 1808, reciting that certain letters patent before then granted by His Majesty for the making, using, and vending a machine for making paper, &c. were, by several assignments, conveyed to the defendant and one *S. Foudrinier*, who, by certain articles of agreement, in consideration of 4350*l.* payable by instalments of 300*l.* yearly, by equal quarterly payments, granted to one *J. S.* the liberty of using the said machine, &c. and that afterwards, the defendant and *S. Foudrinier* assigned the said 4350*l.* to one *L. D.* who assigned to the plaintiff; the defendant and *S. Foudrinier* thereby, in consideration of the premises, covenanted with the plaintiff for themselves jointly and severally, that *in case the said* 4350*l. or any annual instalment thereof, or any part thereof should not be paid to the plaintiff at the times, and in manner provided for in the said articles of agreement, then and as often as such non-payment should happen, the defendant and* S. Foudrinier, *or one of them, would upon demand pay to the plaintiff the said* 4350*l., or so much thereof as should not be paid at the times and in manner provided for, &c.* Breach for non-payment by *J. S.* of 150*l.* for two quarterly payments, of which the defendant and *S. F.* had notice, and payment was demanded of them, &c.

(*a*) This case was argued at Serjeants' Inn before this Term.

The

1816.

HOFFHAM against FOUDRINIER.

The defendant pleads that after the making of the indenture in the declaration, and before the exhibiting of the plaintiff's bill, &c., to wit, the 8th of *Nov.* 1810, the defendant became bankrupt, and that the indenture was made and executed before he became bankrupt, &c. The defendant also pleads that he and *S. F.* before and on the 1st of *Nov.* 1810, and until the suing out the commission against them, were traders, &c., and on the 1st of *November* became indebted to one *M. S.* in 160*l.* and became bankrupts, whereupon a commission upon the petition of *M. S.* issued against them, and they were duly declared bankrupts, and notice thereof was given in the Gazette, and they were required to surrender, and did surrender, and passed their last examination, and in all things conformed. And the defendant afterwards, on the 1st of *March* 1811, obtained his certificate, which was allowed; and the plea concludes, that the indenture declared upon was made and executed by the defendant before he so became bankrupt; *whereby, and by force of the statute, the value of the said annuity in the said indenture mentioned and therein granted and covenanted to be paid as aforesaid, could and might have been proved under the said commission, &c.* Demurrer. Joinder.

Richardson, for the defendant, being called upon to support the pleas, argued that the bankruptcy of the defendant was a bar to this action brought for the recovery of instalments due subsequently to the bankruptcy. For until the stat. 49 *G.* 3, c. 121, these instalments, not being payable before the time of the defendant's becoming bankrupt, were not proveable under the commission; in like manner as rent arrear

after

1816.

HOFFHAM
against
FOUDRINIER.

after the bankruptcy (*a*), or a debt which rested in contingency at the time of the bankruptcy (*b*) were not proveable: and consequently an action for any of these causes was not barred by the certificate. But now by sect. 9. of the statute, all persons who have given credit to any one who afterwards becomes bankrupt, which shall not be payable before the time of his becoming bankrupt shall be admitted to prove. And by sect. 17., it is competent to any annuity creditor, whether there shall or shall not be any arrears at or before the time of the bankruptcy, to prove as a creditor for the value of the annuity, and the certificate shall be a discharge of all future arrears. So that the statute has altered the law in this respect; and whether this is to be considered as an annuity or a debt payable at a future time, it is equally proveable under the commission, and consequently the action is barred. It should seem that this would have been proveable as an annuity against *J. S.* if he had become bankrupt, and why not against the defendant?

Lord ELLENBOROUGH C. J. This is not an annuity, but is a gross sum payable by instalments; and it is a collateral engagement only, and not a debt from the defendant, until default made by *J. S.*, and notice thereof to the defendant. The 9th section of the act provides, "that all persons who have given credit, or shall give credit to any person who shall become bankrupt, for any money which shall not be due at the time of such person becoming bankrupt, shall be admitted to prove such debts;" but the taking a col-

(*a*) 4 *T. R.* 94. *Auriot* v. *Mills.* (*b*) *Cowp.* 460. *Ex-parte Adney.*

1816.

HOFFHAM *against* FOUDRINIER.

lateral security is not giving credit for a sum of money to the person who enters into such security. It is essential that the party should be a creditor of the bankrupt at the time of the bankruptcy; if this be not shewn, the argument upon the statute fails. Now in the present case the plaintiff was not a creditor at that time: the defendant was only contingently liable in case another person should make default; the relation, therefore, of debtor and creditor did not subsist between these parties at the time of the bankruptcy. This case, therefore, is not within either section of the act of parliament.

BAYLEY J. It seems to me that *Hoffham* was not a creditor of *Foudrinier* at the time of his bankruptcy: he could not have made the affidavit necessary to prove a debt. It was not the intention of the act of parliament to lock up the property of a bankrupt, upon a possibility that at some period or other some person may have a claim upon it. We are desired in this case to say, that so large a sum as 4000*l.* of the defendant's property ought to be retained, because *J. S.*, for whom the defendant was surety, might afterwards make default. But at the time of the bankruptcy *J. S.* had not made default. The plea therefore is bad.

Gaselee was to have argued for the plaintiff, but was stopped in the outset of his argument.

Judgment for plaintiff. (*a*)

(*a*) See *Welsh* v. *Welsh*, *ante*, vol. iv. 333.

1816.

RUCKER and Others *against* ANSLEY. (a)

Wednesday, May 1st.

A licence to *C.* and *H.* (who were ship-brokers in *London*) on behalf of themselves and *British* or neutral merchants, to load and export a cargo on board the Russian ship *Fortuna* from *London* to any port in the *Baltic* not under blockade, was held to protect *Russian* property exported from this country on a voyage to a *Russian* port, *Russia* being at war with *Great Britain*.

ASSUMPSIT upon a policy of assurance, dated 18th *July* 1810, on goods on board the ship *Fortuna*; the interest was averred to be in *P. B. Smit* and Co., and the loss by seizure and detention of persons unknown. Plea, non assumpsit. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after *Easter* term, there was a verdict for the plaintiffs, damages 300*l.*, subject to the opinion of the Court upon the following case:

The policy was effected by the plaintiffs, as agents on account of *P. B. Smit* and Co., on goods to be thereafter declared and valued, which valuation was afterwards made, at and from *London* to *Riga*, or any port or ports, place or places in the *Baltic*, backwards and forwards, and until the goods were safely delivered at the houses or warehouses of the consignee, &c., at a premium of 25 guineas per cent., to return 15*l.* per cent. for convoy on arrival; and it was declared to be against all risks.

This policy was effected under these circumstances: in *July* 1810 the plaintiffs received orders from the agent in this country of *Smit* and Co., who were domiciled and carrying on trade at *Riga*, to ship for their account a cargo of goods for *Riga*, the agent having for this purpose chartered the ship *Fortuna*, then

(a) This case was argued at Serjeants' Inn before this Term.

1816.

RUCKER *against* ANSLEY.

then at *London*, in the name of the plaintiffs. About the same time the plaintiffs gave orders to *Castendick* and *Hentz*, ship-brokers in *London*, to procure a licence for the voyage, which *Castendick* accordingly applied for and obtained from the *British* Government, without disclosing in their petition to the Lords in Council that such application was on behalf of *Smit* and Co.

The order in council was dated the 6th *July* 1810, and was stated to be made upon the petition of *Castendick* and *Hentz*, *on behalf of themselves and British or neutral* merchants, permitting them to *load and export on board the Russian ship Fortuna*, bearing any flag except the *French*, a cargo of wine, &c. *British* manufactures, *British* and foreign colonial produce, *East India* goods, and such goods as are permitted by law to be exported, except hemp, from *London* to any port in *Sweden* or the *Baltic* not under blockade; and to import direct from the port of discharge, or to sail in ballast from the said port to any port in the *Baltic* not under blockade, and to import from thence a cargo of grain, if importable, according to the provisions of the corn laws, and such goods as are permitted by law to be imported (except fish and fish oil) to any port in the United Kingdom; the master to be permitted to receive his freight and depart with his vessel and crew to any port not blockaded, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property may appear to belong, &c. The licence was of the

the same date, and in pursuance of the order which was annexed, and pursued the terms of the order.

1816.

RUCKER *against* ANSLEY

The plaintiffs in consequence effected the policy in question, and on the 9th *August* loaded the goods on board the said ship for account and risk of *Smit* and Co., and consigned them to *Smit* and Co. at *Riga*.

On the 21st the ship sailed from *London* with the said licence on her voyage to *Riga*, and in the course of it put into *Memel* through distress of weather, where the goods were seized and condemned.

The case stated, that from the time when the license was obtained and the policy was effected, to the time of commencing the action, *Russia* and this country were at open war.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover; if so, the verdict to stand, otherwise a nonsuit.

And this question as to the effect of the licence to protect a cargo the property of an alien enemy, the like to which had oftentimes before been discussed, was now again argued by *Taddy* for the plaintiffs, and *Carr* for the defendants.

For the plaintiffs it was urged, that this case had been already decided by *Hullman* v. *Whitmore* (*a*); that here the licence was of greater latitude in its language

(*a*) *Ante*, vol. iii. 337.

than

1818.

RUCKER against ANSLEY.

than the licence in that case; for it contained the words "to whomsoever the property appears to belong;" that the case at bar was not distinguishable in principle from *Robinson* v. *Touray*(a), *Hagedorn* v. *Reid* (b), *Usparicha* v. *Noble* (c), *Flindt* v. *Scott* (d), *Flindt* v. *Crokatt* (e), and the *Cousine Marianne* (f).

For the defendant it was argued, that according to the principle laid down by this Court in *Mennett* v. *Bonham* (g), *Flindt* v. *Crokatt* (h), and *Flindt* v. *Scott* (i), general words in a licence were to be construed with reference to the characters of the parties licensed; and therefore if a license be to *British* merchants and others, and *à fortiori* if it be only to *British* or neutral merchants, it shall not be extended to alien enemies. And this principle was not doubted at the time when the cases above mentioned were reversed in the Exchequer Chamber; but the reason for their reversal was, that they fell within the decision of *Usparicha* v. *Noble*. The same principle has been recognized both by the courts of common and civil law, in the following cases, viz.: The *Hoffnung* (k), *Cosmopolite* (l), *Vriendschap* (m), *Jonge Johannes* (n), *Jonge Klassina* (o), *Twee Gebroeders* (p), *Nicoline* (q), *Minerva* (r), *Henrietta* (s), *Hagedorn* v. *Bazett* (t), *Hagedorn* v. *Bell*. (u)

Lord ELLENBOROUGH C. J. These licences, and their effect, have been long and repeatedly a matter of controversy, and have received different interpretations

(a) *Ante*, vol. I. 217. (b) *Ibid*, 567. (c) 13 *East*. 332.
(d) 5 *Taunt*. 674. (e) *Ibid*. (f) *Edw. Adm. R*. 346.
(g) 15 *East*. 477. (h) *Ibid*. 522. (i) *Ibid*. 525. (k) 2 *Rob*. 162.
(l) 4 *Rob*. 8. (m) *Ibid*. 96. (n) *Ibid*. 263. (o) 5 *Rob*. 297.
(p) *Edw*. 95. (q) *Ibid*. 364. (r) *Ibid*. 375. (s) 1 *Dods*. 168.
(t) *Ante*, vol. ii. 100. (u) *Ante*, vol. i. 450.

in

1816.

RUCKER *against* ANSLEY.

in the different courts; and even in the same court, the decisions upon them have not at all times been uniform. And I fear, that in this court, among others, we have not in all respects held to the same course of decision. This, however, I take to be now established, that these licences ought to be construed according to their intention. The petition is not set out in this case, but the order is; and in the absence of the petition, we must suppose that it was in the same form as the order. The question then is, what was the intention of the crown in making such an order, in conformity with which the licence was issued. There is no doubt, that trading with an enemy is illegal; but the Crown may remit its rights in whole or in part, as it shall seem fit. We are then to consider, whether, from the nature of this licence, the Crown could help seeing that the adventure contemplated was a hostile adventure. The licence is to a ship of a hostile country: it is true, that it is granted to *British* merchants on behalf of themselves and other *British* or neutral merchants, but it does not disclose what the interest of the persons licensed was; and it turns out that they were only brokers. The license, then, not being restrained to any particular description of interest, the question is, whether it must not be understood as intended to legalize the adventure. The adventure described in it is the exportation on board a *Russian* ship, bearing any flag except the *French*, of certain enumerated articles, and such goods as are permitted by law to be exported (to whomsoever such property might appear to belong,) from *London*, to any port in *Sweden* or the *Baltic*, not under blockade. It is evident, therefore, that the ship was destined to the very region of hos-

tilities;

1816.

RUCKER against ANSLEY.

tilities; the *Baltic* being at that time, with the exception of a few *Russian* ports, entirely hostile. There is no limitation as to the ship's port of discharge, or the port from whence she should commence her return voyage. It was competent to her to load a return cargo direct from her port of discharge, or to make intermediate voyages to any other ports in the *Baltic*, for the purpose of loading a cargo of grain, the importing of which seems to have been the great object of this licence. The licence being the only thing to mark out and regulate the adventure, both export and import, the question is, whether, seeing that it contains no exclusion of any port or place, or any other restriction than that of the *French* flag, the licence does not impliedly authorize a voyage to the ship's own ports. Adverting to the cases of *Robinson* v. *Touray*, and *Hullman* v. *Whitmore*, which were decided upon a broader principle of policy than some former decisions upon this subject, we must, I think, consider that the licensing of this adventure to a hostile region, in a hostile ship, was intended to protect a hostile cargo, the object being to allow the importation of an article of necessity, even at the expence of obtaining it in a hostile port.

BAYLEY J. I am of the same opinion. The single question is, whether this licence legalized the voyage. Adverting to the words of the licence, and the object of granting it, I cannot help thinking that it contemplated a Russian risk; for if it had been intended to prohibit such risk, I should expect to find some words of restraint. The licence, it is true, is to *Castendick* and *Hentz*, on behalf of themselves, and *British* or neutral

 merchants;

1816.

RUCKER *against* ANSLEY.

merchants; but it is also to load and export on board a *Russian* ship, with full liberty to go to a *Russian* port; so that it is obvious the parties licensed might have to deal with *Russians*. It was suggested in argument, that this licence might possibly have legalized the importation of a *Russian* cargo into this country; but that it was different with respect to the allowing a *Russian* interest to export from hence. I cannot see any reason for the difference; or why, under this licence, *British* capital and *British* risk should be employed in the outfit, rather than *Russian* capital and *Russian* risk. The great object of the licence was to to relieve the *British* market of those articles with which it was overstocked, and to supply a commodity of *Russian* produce, of which this country stood in need. This object was to be attained as well at the hazard of *Russian* as of *British* risk; and *British* capital would be employed, whether the cargo was loaded on *British* or *Russian* account. The *British* merchant would benefit by his commission on the export and import cargo; and the *Russian* would be content to bring his cargo to this country provided he was at liberty to export one from it. The language of the licence is "to load and export;" it is not said that this must be done by the persons licensed on their own account, it is enough therefore that the *British* merchant purchases and loads a cargo for exportation on account of the *Russian* merchant. The material distinction between this case and that of *Hagedorn* v. *Bazett*, is, that here the licence points out the ship as being of a hostile character; in that case it did not. On these grounds it seems to me that the licence legalized the voyage.

HOLROYD

1816.

RUCKER *against* ANSLEY

HOLROYD J. I think the construction which the Court has put upon this licence is the true one, whether we consider the language or the object of the licence. The object was to allow both exportation and importation on board a *Russian* ship; the most likely ports for a vessel of this description to be bound to, were *Russian* ports; therefore we must conclude that the Crown by permitting her to go to any ports in the Baltic, with the exception of such as were under blockade, must have contemplated the probability of her going to a port of her own country. The licence permits the persons licensed to export and import, but does not restrain them to *a cargo of their own property*; and as the ship was to be *Russian*, the probability was that the risk would be the same. This being so, it appears to me that it was the intention of the licence to protect this property, whether it should be the property of the persons licensed, or of any other persons.

Judgment for Plaintiffs.

Wednesday, May 1st.

Sir JOHN BORLASE WARREN *against* SHIRREFF. (a)

A flag officer commanding on a foreign station is not entitled to any share of the freight paid by private merchants to the captain of a ship of war for the conveyance of private treasure on board the said ship to this country, in pursuance of orders issued to the captain by the flag officer, under the authority of the Admiralty.

ASSUMPSIT for money had and received, money lent, money paid and upon an account stated. Plea, non assumpsit. At the trial before Lord *Ellenborough* C. J., at the sittings after last trinity term, there was a verdict for the plaintiff, damages 4000*l.* subject to the opinion of the Court upon the following case:

(a) This case was argued at Serjeants' Inn before this Term.

On

1816.

WARREN *against* SHERRY.

On the 3d August 1812, the plaintiff was appointed commander-in-chief of his Majesty's ships and on the *American* and *West-Indian* station, and while he was in such command, received a letter from the Secretary of the *Admiralty*, dated 22d December 1812, acquainting him that Vice-Admiral *Stirling*, (the commander on the *Jamaica* station) had been directed to give every facility in his power to the object of affording additional security to the transmission of specie from *Jamaica* to *Great Britain*, particularly by the ships having charge of the three regular convoys of *April*, *June*, and *July*; and by any ship that might be occasionally coming home. And that whenever 100,000*l.* should be collected, he was to appoint a frigate to convey the same to this country, if there should not be a ship about to proceed on other accounts. Vice-Admiral *Stirling* was under the command of the plaintiff.

On the 19th *September* 1813, a memorial from several of the merchants at *Kingston*, in *Jamaica*, addressed to the plaintiff, was transmitted to him at *Halifax*, by Rear-Admiral *Brown*, who had succeeded Vice-Admiral *Stirling* at *Jamaica*, requesting the plaintiff to afford them a ship of war for the conveyance of about one million of dollars in specie, to *England*. In consequence of this memorial the plaintiff ordered the defendant, who was captain of His Majesty's ship *Barrosa*, then one of the plaintiff's squadron, to proceed with that ship to *Jamaica*, for the purpose of receiving and conveying to *England* such money and bullion as the said merchants might be desirous of sending thither; and after having received the same, to repair to *Spithead* with all possible dispatch, and follow the

 orders

1816.

WARREN against SHIRREFF

orders of the Lords Commissioners of the Admiralty for his further proceedings. Upon the receipt of this order the defendant sailed from *Halifax* to *Jamaica*, and there received on board the *Barrosa* 1,800,000 dollars, private money, from the merchants in *Jamaica*, for which he signed bills of lading. This specie he carried to *England*, landed at *Portsmouth*, conveyed at his own expence to *London*, and delivered into the Bank of *England*, and received for the freight of the same, after deducting the expences and commission, &c., 10,930*l.* 16*s.* 6d. Previously to the year 1801, it had been a practice in the navy when any consideration was made to the captain of any of his Majesty's ships for the freight of private or public money, for the commander-in-chief, under whose orders such captain sailed, to receive one-third part of the money paid to such captain for freight.

In 1801 the allowance for freight for the carriage of public money by ships of war was discontinued, and no such allowance was paid from that time till 1807, when a correspondence on the subject passed between the secretary of the Treasury and the secretary of the Admiralty; and certain orders of the Lords of the Admiralty were made, which are particularly set out in the case of *Montagu* v. *Janverin*, 3 *Taunt.* 442., and which may be referred to. The payment of freight by merchants for the carriage of private money has never been discontinued. Since the making of the above orders, captains of the navy have constantly received the allowance therein mentioned for conveying public money, and have received freight for conveying private money in the same manner as before; and until the

1816.

WARREN *against* SHIRREFF.

case of *Montagu* v. *Janverin*, were, according to the usage, required to pay, and did pay one-third, as well of the allowance for conveying public money, as of the freight for conveying private money, to the commander-in-chief under whose command they were; but since the decision of that case, many captains have refused to make such payment.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover? If the Court should be of that opinion, the verdict to be entered for the sum of 3643*l.* 12*s.* 2*d.*; if they should be of a contrary opinion, a nonsuit to be entered.

Gaselee contended, that the plaintiff was entitled to one-third of the freight received by the defendant. The result of the correspondence set forth in *Montagu* v. *Janverin*, is, that the allowance of one per cent. for the conveyance of public money was discontinued in 1801, and one-half per cent. was substituted in the year 1807. But this did not affect freight for the carriage of private money, which, it appears, has never been discontinued; and the admiral's and captain's right to it rest upon the same foundation. Both are founded on usage which has never been impeached, and both probably originated in some admiralty order made with reference to the case of prize; where the flag officer, whether actually present or not, is entitled to one of the three-eighth shares given to the captains by the king's proclamation. In maintenance of so long a course of usage, the Court will presume every thing that is necessary to make it lawful, and if it might have originated in some admiralty order it will be sufficient

to

1816.

WARREN *against* SHIRREFF

to give it effect. This is not like the case of a king's ship carrying private treasure on board without orders from a competent authority; if there had been no orders from the admiral, or if those orders had been unauthorized by the admiralty, it might have been argued that the whole transaction was illegal (*a*); but the contrary to this appears; and it is plain, that the admiralty, who were aware of the practice, might have interfered to prevent it, if it had been thought improper: and by omitting to do so, they have tacitly sanctioned it.

Lord ELLENBOROUGH C. J. I think the case of *Montagu* v. *Janverin* has determined this case. The service has been performed for the crown, if the crown has enjoined it; and if the crown has not enjoined it, the performance of it is a breach of duty. In either case the plaintiff cannot recover. It appears that by an order of the Admiralty one-half per cent. is allowed to the captains of his Majesty's ships for the freight of public treasure conveyed on board such ships; but as to the conveyance of money belonging to private individuals, no orders are to be found, there is not a word respecting the freight for any such service. We are desired indeed to presume an order to that effect; but how are we to make such a presumption? The orders of the admiralty are all regularly kept and preserved, and no order of this description appears among them. If any such an order had existed, it would probably have been sought out as a scale for regulating the practice with respect to public money; but we do not find in

(*a*) *Brisbane* v. *Dacres*, 5 *Taunt.* 143. But see 6 *Taunt.* 580.

the

1816.

WARREN *against* SHIRREFF.

the year 1807, when the allowance of one-half per cent. was made, that any such order was forthcoming. The plaintiff can only derive his right from some authority of the Admiralty, and if there be none such, it will not aid his claim to shew that the defendant has no better right to freight than he has to share it.

BAYLEY J. There is no foundation for this claim. Without the order of the Admiralty the defendant could not legally have carried this money; when the Admiralty issued their order, it was no doubt with a view to the public service. Yet it might have been difficult for the captain to enforce payment of any freight from the merchants, if they had chosen to withhold it. This was a king's ship employed in the king's service, and I cannot see that any act has been done by the Admiral to entitle him to share in any reward; he was ordered to dispatch a ship home if under the circumstances pointed out this should be required, and he does so, but there his duty ends. Neither can we presume the existence of an Admiralty order; for if any such existed, it should have been stated in the case.

Per Curiam, Judgment of nonsuit.

Scarlett was to have argued for the defendant.

1816.

Wednesday, May 1st.

THORNTON *against* ADAMS and Others. (*a*)

The stat. 11 *Geo.* 2. c. 19. empowering landlords to follow goods fraudulently and clandestinely carried off the premises within 30 days, applies to the goods of the tenant only, and not to those of a stranger; wherefore a plea justifying the following goods off the premises, and distraining them for rent arrear, must shew that they were the tenant's goods.

IN trespass for breaking and entering the plaintiff's warehouse, and taking and distraining his goods, the defendants justified under a demise from the defendant *Adams* to one *Neilson*, of a counting house, at a yearly rent of 50*l.* payable quarterly, and because a quarter's rent was in arrear on the 25th of *March* 1815, and the said *Neilson* fraudulently and clandestinely carried off the goods from the premises, to prevent the defendant *Adams* from distraining, and conveyed the same to the plaintiff's warehouse, without leaving any other goods on the premises, therefore the defendants, within 30 days, entered the said warehouse, the door thereof being open, and took the said goods, &c.

And upon special demurrer, assigning for cause, that it was not alleged that the said goods were the property of *Neilson*, but on the contrary it was admitted that they were the property of the plaintiff, and joinder in demurrer,

Comyn, in support of the demurrer, argued that the plea was ill. For the statute 11 *Geo.* 2. *c.* 19., which empowers landlords to distrain and sell goods fraudulently or clandestinely carried off the premises within 30 days, plainly extends to the tenant's goods only, and not to the goods of a stranger; for the statute says, "in case any tenant shall fraudulently or clandestinely

(*a*) This case was argued at Serjeants' Inn before this term.

carry

1816.

THORNTON *against* ADAMS and Others.

carry off *his or her* goods;" and, therefore, though by the common law the landlord may distrain upon the premises, for rent arrear, without regard to whom the property belongs, yet, here, in order to give effect to this statutable remedy, the plea ought to shew that the goods were the goods of *Neilson*, for otherwise the defendants are not justified in following them. But the declaration alleges that they were the plaintiff's goods, and the plea is silent as to the property. Wherefore the plea is ill.

Lawes and *F. Pollock* contrà, argued, that by coupling the 1st and 7th clauses of the act together, it was plain that the remedy of the landlord was not intended to be restrained to the tenant's goods; for the language of the 7th clause is general, "where *any* goods fraudulently or clandestinely carried away." But admitting that the remedy is so restrained, enough is stated in the plea to shew that this was the tenant's property; for the plea states that he fraudulently and clandestinely removed it; which is admitted by the demurrer, and imports *ex necessitate* that it was the tenant's property, for otherwise the removal of it, as it regards the landlord, could not be said to be fraudulent and clandestine.

Lord ELLENBOROUGH C. J. I cannot say that the terms fraudulently and clandestinely supply, by necessary intendment, the allegation that these goods were the goods of the tenant. This plea seems to have been framed upon a supposition that to whomsoever the goods might belong, the tenant could not lawfully remove them; whereas the language of the 1st and 3d clauses of the act of parliament is explicit;

 it

1816.

THORNTON *against* ADAMS and Others.

it says his or her goods; and there seems to be no reason for supposing that the 7th section meant any other goods.

BAYLEY J. The plea must be taken most strongly against the pleader; and it is not pleaded that the property was *Neilson's* at the time of the removal. It is argued that it must have been his, because the removal is alleged to be fraudulent and clandestine; but I think this by no means follows, for if *Neilson* removed the goods clandestinely, proof of that would have been sufficient to support the plea; and it is plain that he might have removed them clandestinely, although they were not his.

Per Curiam, Judgment for the plaintiff.

Wednesday, May 1st.

DOE, on the several Demises of COPLESTON and Others, *against* HIERN and Another. (*a*)

Under a power to tenant for life to lease for 99 years determinable on one, two, or three lives, a leafe for 99 years, if *E. H.* should so long live, to commence from the death of *J. L.* and *M. R.* (two lives on which a subsisting lease for years was determinable) was held in

EJECTMENT for lands in the parish of *Milton Dumarel*, in *Devon*. Plea not guilty. At the trial before *Bayley* J. at the *Devon Lent* assizes 1814, there was a verdict for the plaintiff, subject to the opinion of the Court upon the following case:

The Rev. *R. Gay*, clerk, being seised in fee of (among others) the lands in question, by his will, dated the 16th of *February* 1752, devised to *F. H.* and his heirs, all his messuages, land and hereditaments lying in the counties of *Devon* and *Cornwall*, or elsewhere,

(*a*) This case was argued at Serjeants' Inn before this term.

1816.

DOE dem. COPLESTON against HIERN.

where, to the use of his cousin *James Gay* for his life; remainder to the use of the first and other sons of the said *James Gay* in tail male; remainder to the use of his cousin *Nicholas Gay* for life; remainder to the use of the heirs male of the said *Nicholas Gay*, with divers remainders over. And in the said will there was this proviso: "that the said *James Gay*, if he shall live to attain his age of 21, and also his heirs male in like case, and also the said *Nicholas Gay*, and also every other person for whose use the said lands are devised in trust, shall *have power to grant, demise, set, and let during his and their life and lives, all or any part of my said lands so devised to the said F. H., in trust as aforesaid, for the term of 99 years, to be determined on the death of one, two, or three lives;* and that such lease and leases so made and granted by the said *James Gay* or either of them shall be good subsisting leases to all intents and purposes, as if I had devised the fee-simple and inheritance of my said lands to him the said *James Gay*, or to either of them, without any limitation thereof, any thing hereinbefore contained to the contrary notwithstanding." The testator died in *January* 1755; *James Gay* entered and was possessed, and by indenture of the 25th *August* 1794, between himself of the one part, and *Philip Hiern* of the other, reciting the said will, and the leasing power therein contained, he by virtue and in execution of the said power, demised to the said *Hiern* the premises in question; *Habendum*, for 99 years, if *E. H.* should so long live, the said term to commence from and immediately after the death of *J. L.* and *M. R.* (*a*) *Reddendum* the rent therein specified.

(*a*) *Note.* That *J. L.* and *M. R.* were lives on which a subsisting term for years was determinable, though the case did not so state.

Afterwards,

1816.

Doe dem. Copleston *against* Hiern.

Afterwards, in 1794, the said *James Gay* died without issue male, leaving *Nicholas*, the son of *Nicholas Gay* (the second tenant for life who died in the life-time of *James Gay*) him surviving, who thereupon became entitled as tenant in tail under the will, and suffered a recovery, and conveyed the premises to the lessors of the plaintiff in fee, *J. L.* and *M. R.*, the persons upon whose deaths the reversionary term granted by the said *J. Gay* was to commence, survived the said *J. Gay*. The defendants claimed to be entitled under the said lease.

And the question was, whether the plaintiff was entitled to recover. If the Court should be of that opinion, the verdict to stand, otherwise a nonsuit to be entered.

Gifford, for the plaintiff, contended that the lease was void; 1st, because the power did not warrant the grant of a lease in reversion; and if it did, 2dly, because this was not such a lease in reversion as was warranted by the power. He admitted, that powers were to be construed according to the intention of the parties creating them; yet, a general power to lease, without more, will not authorize a lease in reversion. (*a*) In some cases, indeed, under a general power to demise, a lease in reversion will be good; as, if the estate be in lease at the time of granting the power; or if the power be, so as there be not at any one time a greater estate than some particular estate specified, and the old lease and reversionary lease together, do not exceed

(*a*) Countess of *Sussex* v. *Wroth*, *Cro. Eliz.* 5. *Shecomb* v. *Hawkins*, *Cro. J.* 318., more fully *Yelv.* 222. *Baines* v. *Bilson*, *T. Raym.* 247.

this

1816.

Doe dem. Copleston against Hiern.

this limit (*a*); for, in such cases, there is evidence of an intention that leases in reversion should be granted. But in the case at bar, no such intention is manifested; and therefore the rule laid down by *Pratt* C. J. in *Coventry* v. *Coventry*, applies, namely, that by a general power, it must be restrained to leases in possession. (*b*) With respect to that part of the will which declares, that "the leases shall be good and subsisting leases to all intents and purposes, as if the testator had devised the fee-simple and inheritance;" that is only added in confirmation of such leases as should be made according to the power, not in extension of the power itself, and is indeed no more than the law would have implied without it: 2dly, admitting that under the power a lease in reversion would be good, yet here the lease is not properly a lease in reversion, but a lease *in futuro*. For a lease in reversion is when it is to take effect after a prior subsisting interest; but a lease *in futuro*, is when it is granted at a day to come, but is not dependent on a subsisting prior interest. (*c*) And such is the lease in the case at bar; for it is not made to commence on the determination of the subsisting lease, but on the deaths of *J. L.* and *M. R.* who might by possibility survive the term in the subsisting lease, in which case the reversionary interest must have waited to take effect, although the prior interest was determined. Consequently, this was not a lease in reversion, but a lease *in futuro*, and therefore void on this account. And if this lease be

(*a*) *Coventry* v. *Coventry*, 1 *Com.* 312.

(*b*) See *Sugden* on *Powers*, 584. 2d Edit.

(*c*) See *Winter* v. *Loveday*, 1 *Com.* 38. *per Holt* C. J.

good,

1816.

Doe dem. Coplestion against Hiern.

good, there is no reason why a lease to commence 1000 years hence would not also be good.

Gaselee contrà, argued that this was not a lease in reversion, but was in effect a present lease for 99 years determinable on three lives; for it was to depend on the existence of three lives in being and could not exceed it, and so no greater charge on the reversion than the power warranted. In like manner, under a power in a will to lease for 21 years, if a lease be made for that term, and a year before its expiration the donee make a new lease for 21 years to another person, to begin *in præsenti*, the second lease is good; for it is to begin presently, and so the inheritance is not charged in the whole with more than 21 years. (*a*) The distinction between the effect of a power to grant a chattel or a freehold lease, is well laid down by Lord *Ellenborough*, C. J. "A chattel lease," says his Lordship, "may be granted pending a prior subsisting one, provided it be within the limits of the power, "and provided it give no beneficial interest during the "continuance of the subsisting lease; but so long as "there is a freehold *in esse*, a second freehold lease "cannot be granted." And he puts this instance; "if there were a chattel lease for 99 years determinable on three lives, and one of those lives were to "drop, a second chattel lease for a new life, in addition to the other two, might be granted during the "continuance of the first." (*b*) Which reasoning and position, as it is submitted, governs the present case.

(*a*) *Read* v. *Nashe*, 1 *Leo.* 147. (*b*) *Roe* v. *Prideaux*, 10 *East*, 184, 185.

Lord

1816.

DOE dem. COPLESTON *against* HIERN.

Lord ELLENBOROUGH C. J. What induced the testator to create a power to lease for 99 years determinable on three lives, in preference to a power, to lease for three lives, we do not know; it might have been equally beneficial to the tenant for life to have empowered him to lease for three lives; but the testator has not so willed, and his will must be conformed to; the power says to demise and let for 99 years determinable on one, two, or three lives. The term "demise and let" imports a present possession; if the lease cannot be executed *in præsenti*, it is hardly capable of the sense belonging to the expression, "to demise and let." It does not appear that the lease in question was any thing more than a grant of an interest to be postponed to a future time. The lessor died before the prior lives dropt, the lease therefore must take effect, if at all, after the donee's death. The prior term might also by possibility be expended before the lives, and it certainly was not the intention of the devisor that the tenant for life should have power to postpone the grant of an interest to so distant a period, but only that he should encumber the estate to the extent of a term for 99 years determinable on three lives.

BAYLEY J. I am of the same opinion. Where a person creates a power to make leases, it must appear that the lease made under the power falls within the intention of the person creating it; and if there is no circumstance, whence it can be inferred that he intended that a lease in reversion should be made, the donee of the power can only make leases in possession. If this had been a lease for 99 years determinable on the life of *E. H.*, to commence from the date of the demise

1816.

Doe dem. Copleston against Hearn.

mise or its execution, it might have come within the case of *Coventry* v. *Coventry*. In the county where this land lies it is the practice, I believe, to grant the lands upon leases for lives; and supposing the tenant for life would be warranted according to this practice in adding new lives to a subsisting lease, yet that would be no authority in the present case for granting a term which is not to commence *in præsenti*. Here the term is made to commence at a future time, *viz.* from the expiration of two lives. The lease is therefore void.

Per Curiam, Judgment for the Plaintiff.

Note. In *Doe* v. *Oxenham*, which stood next in the paper for argument, the lease made by *J. Gay*, to the defendant, was "for 99 years, if two lives therein named should so long live, to commence from the death of *Thomas Slocomb*," and *Slocomb* died in the lifetime of *J. Gay*; but the Court considered that this made no difference in effect, and gave judgment for the plaintiff.

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE. (*a*)

Wednesday, May 1st.

A loss of voyage for the season by perils of the sea, is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, &c. where the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding in the voyage.

The assured are bound to give notice of abandonment at the earliest opportunity; notice given five days after they received intelligence of the loss, was held too late.

If one of several jointly interested in a cargo, effects an insurance for the benefit of all, he may give notice of abandonment for all.

COVENANT on a policy of assurance, dated 9th *September* 1813, on 150 barrels of pork, valued at 900*l.* and 300 barrels of flour valued at 1200*l.*, at and from *Waterford* to *St. John's, Newfoundland*, by the ship *Coffee Planter*, warranted "free from average on flour, &c., unless general or otherwise specially agreed," and with a special memorandum of agreement "in case of particular average on flour occasioned by the ship being stranded, to pay so much hereof as should exceed 5 per cent." And the plaintiffs after averring the loading of the goods, and that the interest was in them, declare that the ship with the said flour and pork sailed from *Waterford* on the voyage insured, and during the voyage met with tempestuous weather, and having thereby received much damage, part of the goods were necessarily thrown overboard to lighten the ship, and the ship with the residue of the goods was driven back to *Cork*, and by means of the premises became wholly unfit and incapable of performing the voyage, and was therefore condemned and broken up, and so the remainder of the goods never arrived at *Newfoundland*, but the voyage was wholly lost, wherefore the plaintiffs abandoned the remainder of the pork and flour to the defendants. The defendants pleaded *non infreg. convent.* and paid into Court 835*l.* 3*s.* 6*d.* At the trial at the last *Devon* Summer assizes, a verdict was found for

(*a*) This case was argued at Serjeants' Inn before this term.

the

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

the plaintiffs, damages 652*l.* 8*s.* 8*d.* subject to the opinion of the Court on the following case.

Two of the plaintiffs reside at *Waterford* in *Ireland*, a third at *Sidbury*, and the remaining two at *Dartmouth* in *Devonshire*. The plaintiffs who resided at *Waterford*, caused the said insurance to be effected in *London*, and were interested in one-third of the pork, and half of the flour; the other plaintiffs being interested in the residue. The goods were loaded at *Waterford*, and the ship sailed as stated in the declaration, and joined convoy at *Cork* on the 3d of *October* 1813; and in the course of her voyage between the 8th of that month and the 13th of *November*, continued to meet with such tempestuous weather, and thereby suffered such heavy damage, that it became necessary, in order to lighten her, to throw overboard at different times various parts of her cargo and provisions, and also five of her guns; and finally it became necessary for the preservation of the ship and cargo to put back to *Cork*; which place she reached on the 16th of *November*. On the next day a protest was made by the captain and two of his crew, stating the damage which the ship had sustained, and on the succeeding day a survey was held on the ship, and a farther survey on the 8th of *December*. By the report of the surveyors on the latter survey, which was drawn up by the notary on the 11th, the ship was pronounced to be not worth repairing, and her hull and materials were directed to be, and were sold by public auction. Soon after the ship's return to *Cork*, the whole of the goods insured, except 24 barrels of flour thrown overboard, were landed and warehoused. On the 15th of *December* the plaintiffs who resided at *Waterford* apprized the

14 plaintiffs

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

plaintiffs who resided at *Dartmouth*, by letter of the ship's being condemned; but before their letter reached *Dartmouth*, *viz.* on the 18th, received a letter from the plaintiffs resident there, written on the 12th of *December*, desiring them in the event of the ship's condemnation to cause notice of abandonment to be given them, in consequence of which letter they wrote on the said 18th to the brokers in *London*, to give such notice. This letter was received by the brokers on the 21st, who accordingly on the next day gave notice of abandonment to the defendants, which was the first communication made to them by the plaintiffs or their agents of the accident that had befallen the ship and cargo; and no document or statement was then furnished to them of the state or condition of the cargo. The defendants on receiving the notice answered that they had no orders to give, but that the assured must act as if they were not assured, and make their claim on them for any loss they were liable to pay. So soon as it was determined by the owners of the ship that they could not repair her, the pork and flour were sold by public auction, which was on the 8th of *March* 1814. Owing to the damage sustained by the ship, the goods could not be forwarded by her, and no opportunity afterwards offered of forwarding them by any other ship to *St. John's*, *Newfoundland*, until the spring of 1814. The sum of 835*l.* 3*s.* 6*d.* paid into Court is the amount of the general average and the partial loss of the pork, and for such part of the flour as was thrown overboard in the course of the voyage. The question for the opinion of the Court is, whether under the circumstances above stated, the plaintiffs had a right to abandon, and if so, whether the abandonment was made

1816.

HUNT and Others against THE ROYAL EXCHANGE ASSURANCE.

in time. If the Court shall be of opinion with the plaintiffs on both points, the verdict to stand; if not, a nonsuit to be entered.

This case was argued by *Gaselee* for the plaintiffs, and *Gifford* for the defendants. For the plaintiffs it was argued that they had a right to abandon, upon the principle laid down in *Le Guidon* (*a*), and adopted by Lord *Mansfield* (*b*), that an assured may abandon if there be any such interruption as defeats the voyage, or makes it not worth pursuing. That in conformity to this principle it was determined in *Manning* v. *Newnham* (*c*), that if the ship be prevented from proceeding on her voyage, and the voyage be thereby lost, it is a total loss, not only of ship and freight, but also of the cargo, if no other ship can be procured to carry it to its port of destination. That this doctrine, that a loss of voyage is a cause of abandonment, appears to have been recognized by Lord *Ellenborough* C. J. more than once (*d*), though of late it had been somewhat narrowed. But wherever this had been done it would be found that there was something to warrant the deviation from the rule without infringing it; as where the case did not state that other means of forwarding the cargo to its destination could not be procured (*e*); or where it appeared that the cargo was not of a perishable nature (*f*), so that delay could not be predicated to be injurious to it. Secondly, it was argued that where there is a right to abandon, there is no particular limit of time within

(*a*) *Chap.* 7. § 1. (*b*) *Goss* v. *Withers*, 2 *Burr.* 697.

(*c*) *Park, Ins.* 260. 7th edit.

(*d*) *Anderson* v. *R. E. Assurance*, 7 *East*, 42. *Wilson* v. *R. E Assurance*, 2 *Camp. N. P. C.* 623.

(*e*) *Thompson* v. *R. E. Assurance*, 16 *East.* 214.

(*f*) *Anderson* v. *Wallis*, *ante*, vol. ii. 240.

which

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

which that right must be exercised, except that abandonment must be made within a reasonable time, and while the loss continues in its nature total. (*a*) That what is a reasonable time must depend upon the circumstances of every case; and that in the present, considering that the final condemnation of the ship was not pronounced until the 11th *December*, when the survey was drawn up, and that the assured by reason of their residing at a distance from each other, required time for communicating among themselves, and afterwards for instructing their broker who resided in *London*, it could not be reasonably expected that notice should be sent by them before the 18th *December*. The assured were not bound to attend to this business to the exclusion of all other.

For the defendants it was answered that the case at bar was not distinguishable upon the first point from *Anderson* v. *Wallis*, which determined that a mere retardation of the voyage, where the insurance was on goods, was not a ground of abandonment; and which decision, confirmed as it was by a subsequent case (*b*), had materially abridged the position laid down with too much generality in *Manning* v. *Newnham*. That with respect to any distinction on account of the perishable nature of the cargo in this case, it was not stated as a fact, nor was it to be inferred from the natural quality of flour, that a few months' delay in its arrival was of such consequence as to make a total loss of the commodity in the highest degree probable at the time of abandonment; and unless that were the case, whether the cargo consisted of iron or of flour, it matters not as to

(*a*) *Anderson* v. *R. E. Assurance*, 7 *East*, 38.
(*b*) *Everth* v. *Smith*, *ante*, vol. ii. 278.

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

the right to abandon. Secondly, that the abandonment was out of time was plain from this, that the plaintiffs at *Waterford* who caused the insurance to be effected for all, had an implied authority to give notice of abandonment for all; therefore all shall be affected by their knowledge, being jointly interested, in like manner as the knowledge of one partner shall bind the rest. Wherefore taking it that intelligence of the ship's condemnation reached *Waterford* on the 2d or 3d day after it was drawn up, the assured were in a condition to send off notice of abandonment on the 14th or 15th *December* at the latest, and could not be warranted in waiting until the 18th. For admitting that they were not bound to relinquish all other concerns for this one alone, yet were they bound to make their election to abandon in the first instance, that is, at the earliest opportunity after they were apprized of the state of the cargo. (*a*)

Lord ELLENBOROUGH C. J. Upon full consideration of this case I am very much inclined to think, on both grounds, that the abandonment is not sustainable. I am perfectly satisfied that the abandonment was not made in due time; and on the second point the strong inclination of my mind is, that the assured were not entitled to abandon at all. I shall invert the order of argument and consider what respects the time first. This was an insurance for the interest of all concerned, and it was effected by direction of the part owners jointly interested therein, and residing at *Waterford*: they effected it for all, and all adopt them as the ge-

(*a*) *Gernon* v. *R. E. Assurance*, 2 *Marsh R.* 88.

neral

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

neral agents for this purpose. And *primâ facie* if there be not any restriction of their authority, they being interested in the subject matter, would have a right to deal with the insurance throughout, and to abandon for the rest. Accordingly we find them giving direction to the brokers to give notice of abandonment; but at what time have they fair presumptive notice of the ship being in a state which, as they insist, entitled them to abandon; and when does due notice of abandonment reach the abandonee? The ship returned to *Cork* on the 16th of *November* in such a condition as rendered it necessary to hold two successive surveys upon her, and in the result she was broken up. It does not however necessarily follow that because the ship was broken up the cargo could not have been transmitted to its place of destination, before any material deterioration of the commodity took place by reason of the delay. The 16th of *November* was the day of the ship's arrival at *Cork*: it is hardly possible to conceive that merchants resident at *Waterford*, who were interested in the concern, should not hear of her arrival at *Cork* within a day or two after. The arrival of a ship at *Gravesend* will in the common course of things be known by the owner in *London* within a day or two; we may therefore fairly infer that intelligence of her arrival reached *Waterford* in due course without a positive finding to that effect. The state of facts, and the length of time occupied in the two successive surveys, shew that the paintiffs could not possibly have been ignorant of what was going on; and we must assume that the merchants at *Waterford* knew of the ship's misadventure and arrival at *Cork* within a few days afterwards. What then was their duty on being apprized of the ship's arrival? If they

1816.

Hunt and Others *against* The Royal Exchange Assurance.

proposed resorting to the underwriter as for a total loss, it behoved them as owners of the goods to address themselves to the underwriter promptly, and not to lie by for the result of a final survey, but to act on the means of information which they then had at hand. They might indeed avail themselves of any information which the survey afforded; but they were bound to act within a reasonable time. Now let us consider when the merchants at *Waterford* must have been in possession of full knowledge of all the circumstances. The second survey was on the 8th of *December*. Allowing them to wait the slow progress of the notary till the report gets *in scriptis* on the 11th, and giving them until the next day to make a copy of the survey, we shall find that on the 13th probably the merchants at *Waterford* were in complete possession of the facts. What is the time, according to the course of the post for the conveyance of intelligence from *Waterford* to *London*? It is said that four days would be the course of post, that is, I imagine, by the way of *Bristol*, and not by *Dublin*. Calculating then four days from the 13th, will bring us to the 17th, on which day the plaintiffs might have abandoned to the underwriters; they do not, however, abandon until the 22d. There was therefore a laches of five days. And where persons are excluded by the terms of the policy from indemnity by an average clause, they ought to make use of the earliest time to take themselves out of the exception: there should not be any loitering. Under these circumstances I think the abandonment was out of time. Secondly, as to the right to abandon; I think this case comes very much within all the doctrine laid down in *Anderson* v. *Wallis*. Here was a retardation only of the adventure: it is stated that the

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

cargo could not have been forwarded before the next spring; that is, it might have gone then; for it must be presumed that at such a port as *Cork* there would be found some vessel for the next season to forward the cargo to *St. John's*. If indeed the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing insured. In the case of *Anderson* v. *Wallis*, the cargo consisted of iron and copper, articles not capable of sustaining injury from the delay; and in like manner here, the pork being out of the question, I cannot necessarily infer that the flour would be changed in quality and condition by the delay from *November* to *April*, so as to incur any material damage operating a destruction of the thing insured. If there were any facts to lead to the conclusion, that the cargo would have been thus materially damaged by the delay, they should have been found; but nothing of that kind appears. Under these circumstances, and on the principle of *Anderson* v. *Wallis*, I think this was a mere retardation of the voyage, and not the subject of abandonment.

BAYLEY J. I am of the same opinion upon both points. This must be considered as a policy on flour only (for the pork is out of the question) with a warranty free from average unless general or the ship be stranded. The object of that memorandum was to place the subject matter of insurance, which was of a perishable nature, on the footing of an imperishable commodity; to cast on the assured the risk of partial damage, leaving to the underwriter the risk of total loss. The ship sails, and having met with tempestuous weather returns to *Cork* on the 16th of *November*, and on the 18th a

 survey

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

survey is held upon her, and a second and final survey on the 8th of *December*. It is not until the 18th of that month that the owner of the cargo attempts to abandon. The questions which arise for our consideration are, first, whether the circumstances warranted an abandonment; and, secondly, whether the abandonment was made in due time. The ground on which the plaintiffs insist that they were warranted in abandoning, is that the voyage was lost, and that the loss of voyage in a case like the present is a good cause of abandonment. And the case of *Manning* v. *Newnham* has been relied on as an authority importing that an assured is entitled to abandon ship, freight, and goods, in the event of the voyage being lost. But on reference to the language of this policy, it is difficult to infer from any part of it that the assured were to be entitled to abandon o . the ground of a mere loss of voyage. For suppose in this case the ship before she set sail, had been run foul of by another vessel but not so as immediately to sink, and the flour had been relanded, and afterwards the ship had gone to the bottom, the flour being in an undamaged state, but there being no other ship at the port capable of immediately forwarding the cargo to the place of its destination; if the argument for the plaintiffs be good, it follows, that the assured, under such a state of circumstances, would be entitled to abandon. But I know of no authority that can fairly be said to go that length. There are cases certainly which speak of a loss of voyage as a ground of abandonment; and such cases may be conceived. For instance, if a ship were so damaged, as to be obliged to land her cargo at an unfrequented place, where there was no opportunity of disposing of the cargo, and the ship-owner could not procure another

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

another vessel to forward the cargo, except at an expence exceeding the value of the goods; such a case, I think, might warrant an abandonment, and throw the loss on the underwriter. But there is a great difference between the case just put and this case, where goods are safely warehoused in an undamaged state, and where there is nothing but a disappointment of voyage to constitute a ground of abandonment; for we are not warranted in supposing that the goods were in a worse condition than when they were put on board. On these grounds it seems to me that the assured have no right to abandon. The case of *Parsons* v. *Scott* (*a*) shews that it was the opinion of the Court of Common Pleas that a mere loss of voyage does not enable the ship-owner to abandon if the ship is in safety. But in the present case it is by no means clear that there has been a loss of voyage. This is a policy on goods, which are not so necessarily connected with the ship, that if the ship be lost, there must be of course a loss of voyage with respect to the goods; because if the goods are in safety, they may be transhipped and conveyed to their destination. It is true, that in this instance the goods could not be forwarded immediately in another ship, but *non constat* that they might not be sent at a future time. If the cargo be of an imperishable nature, it matters not, except as it regards the market, whether it reaches its destination in the autumn or in the spring following. If so, in what does this case differ from the case of a retardation of the voyage, which according to *Anderson* v. *Wallis* is not a sufficient ground of abandonment. On the other point,

(*a*) 3 *Taunt.* 363.

viz.

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

viz. whether the abandonment was made in due time, it has been suggested for the plaintiffs, that the case does not find at what time the plaintiffs who lived at *Waterford* were apprized of the damage, nor that they knew of the ship's arrival at *Cork* before the day when they wrote to *Dartmouth.* But considering that they lived within so short a distance of *Cork*, the probability is, that they must have known the fact very soon after the ship's arrival. We are here upon a special case, which need not be scanned like a special verdict; and as the plaintiffs might have shewn when it was that they first received intelligence, in order to satisfy the time of their giving notice, it may fairly be presumed, in the absence of any such statement, that they must have heard of the ship's arrival at *Cork* within a reasonable time. It appears that the final survey was held on the 8th of *December*: if the plaintiffs at *Waterford* knew of the ship's arrival before that time, it behoved them to have some person on the spot to communicate the result as soon as the survey was made. Admitting that they were at liberty to wait for the tidings of the survey, these must have reached *Waterford* in due course on the 12th or 13th. They knew before that the ship had put into *Cork* damaged, and that the goods had been landed; and on the 12th or 13th they must have learned that the ship would never proceed. Was it not then their duty to write forthwith with instructions that, as to their interest at least, they were resolved to abandon? As to the parties who resided at *Dartmouth* it appears that they were not ignorant that the ship had reached *Cork*, for they wrote to *Waterford* on the 12th *December*, with instructions prospectively to abandon in the event of her condemnation.

But

But if their partners at *Waterford* were not already authorized to abandon on their account, what prevented them from writing earlier than the 12th with these instructions? Their having omitted to do this places them, as it seems to me, as much out of time as their partners at *Waterford*.

1816.

HUNT and Others *against* THE ROYAL EXCHANGE ASSURANCE.

HOLROYD J. I am of the same opinion on both points, for the reason already given. The statement of this case does not sufficiently establish the fact that the voyage has been lost; it does not appear that the cargo might not have been forwarded the following spring, nor that there was any danger of its perishing in the meanwhile. In *Thompson* v. *The Royal Exchange*, it was considered that the incapability of the ship to proceed with the cargo was not a ground of abandonment; which is also the doctrine of *Anderson* v. *Wallis*. On the second point, it seems to me that the plaintiffs who caused the policy to be effected, must be considered as agents for the rest; this was a joint insurance, and in the nature of a partnership, as it regards this transaction; and like the case of several persons who join in making promissory notes, although they are not otherwise partners, the act of one, as it relates to the particular transaction, shall be sufficient to bind the rest. It seems to me, therefore, that the abandonment was not in due time, but ought to have been made at an earlier period.

Judgment of nonsuit.

1816.

Wednesday, May 1st.

HOMFRAY and Others *against* RIGBY.

After a plea of *non est factum*, and that the bond was obtained by fraud and covin, where breaches are not assigned in the declaration, the plaintiff may *suggest* them under stat. 8 and 9 *W.* 3. *c.* 11. in making up the issue.

DEBT on bond. The defendant after craving oyer of the bond and condition, by which it appeared that the bond was given to secure payment of 3270*l.* and interest, by four instalments, on days therein mentioned, pleads *non est factum*; *secondly*, fraud and covin, setting forth the same specially; *thirdly*, fraud and covin generally. The plaintiffs in their replication join issue on these pleas, and then proceed to suggest breaches under the stat. 8 and 9 *W.* 3. *c.* 11. viz. the non-payment of the several instalments, and interest at the days, &c.

And after verdict for the plaintiffs, before *Holroyd* J. at the last assizes for the county of *Monmouth*, it was now moved by *Peake* in arrest of judgment, or that a repleader might be awarded; for it is irregular, after issue joined upon the pleas of *non est factum*, and of fraud and covin, to suggest breaches. The stat. 8 and 9 *W.* 3. *c.* 11. *s.* 8. only warrants the suggestion of breaches in three cases, viz. on judgment by demurrer, confession, or *nil dicit*; so that the plaintiffs ought not in this case to have suggested the breaches, but ought to have assigned them in their replication, and then the defendant might have denied the truth of them; whereas now he is prevented from so doing. The statute is compulsory on the plaintiff to proceed in the method it prescribes (*a*); and under it the breaches

(*a*) *Drage* v. *Brand*, 2 *Wils.* 377. *Hardy* v. *Bern*, 5 *T. R.* 636.

 might

1816.

HOMFRAY and Others *against* RIGBY.

might have been assigned in the declaration, or in the replication. And though it appears from one case in this Court that after plea of *non est factum*, where the breaches were not assigned in the declaration, the plaintiff was allowed to suggest them (*a*); yet in the Common Pleas in later cases it has been held otherwise; and it was said by the Court, "that under the statute 8 and 9 *W.* 3., there is no power of introducing any "suggestion on the record, except in the three cases "of judgment upon demurrer, by confession, or *nil* "*dicit.*" (*b*) Again, it has been decided, that after plea of performance, if the plaintiff instead of assigning breaches in the replication, take issue on the performance, and then suggest breaches of the condition, it is ill on demurrer; and if the defendant do not demur but join issue and go to trial thereon, yet the Court after verdict will award a repleader. (*c*) It was asked by one of the Judges in that case, "Can the plaintiff *assign* breaches after issue joined on one traverse?" And he emphatically added, "A suggestion is one thing, the replying those breaches is another." The more modern and better practice seems to be to set out the condition, and assign breaches in the declaration. (*d*)

The Court considered the case of *Ethersey* v. *Jackson*, as an authority for what had been done in the present; and distinguished *Plomer* v. *Ross*, because the plaintiff in that case tendered an issue which was bad in law: here there was a perfect issue and a distinct suggestion.

Rule refused.

(*a*) *Ethersey* v. *Jackson*, 8. *T. R.* 255.
(*b*) *De la Rue* v. *Stewart*, 2 *N. R.* 363.
(*c*) *Plomer* v. *Ross*, 5 *Taunt.* 386. (*d*) 2 *Wms. Saund.* 187. *a.* (2.

1816.

Thursday, May 2d.

SWINYARD and Others *against* BOWES.

Where defendant being indebted to plaintiffs for goods sold, and C. being indebted to defendant, plaintiffs, with consent of defendant, drew a bill on C. payable at 2 months, which C. accepted, but afterwards dishonoured: Held that defendant was not entitled to notice of the dishonor, his name not being on the bill, and that the bill was not to be esteemed a complete payment of the debt under stat. 3 & 4 *Ann. c.* 9. *s.* 7.

ASSUMPSIT for goods sold and delivered. Plea non assumpsit. At the trial before *Bayley* J. at the last *Kent* assizes, the case was this: the defendant being indebted to the plaintiffs for materials furnished for the building of a mill, and one *Chesner* being indebted to the defendant for the building of the said mill, *Chesner* with the consent of the defendant allowed the plaintiffs to draw on him by a bill for 126*l.* payable at 2 months to the order of the plaintiffs, which bill *Chesner* accepted. When the bill became due, which was on the 4th *February* 1815, it was presented for payment and dishonoured; but not protested or noted, nor was any notice of the dishonour given to the defendant until after the 11th *February*, on which day *Chesner* became bankrupt. The defendant's name was not on the bill, and it was proved that *Chesner* was not in a condition between the 4th and 11th *February* to pay the bill. It was objected to the plaintiffs' right to recover, that as they had failed to give notice to the defendant of the dishonour of the bill, they had by their laches made the bill their own, and the same was to be esteemed a complete payment of the debt, under the 3 & 4 *Ann. c.* 9. *s.* 7. But the learned Judge overruled the objection; for that notice was only required by the custom of merchants to be given to such as was a party to the bill, which the defendant was not; nor did it appear that he had suffered any damage by

reason

1816.

SWINYARD and Others *against* BOWES.

reason of the want of notice. A verdict was found for the plaintiffs.

Taddy now renewed the objection upon a motion to set aside the verdict, and contended that the object of the above cited clause of the statute was to compel all persons who received a bill in satisfaction of a former debt to take the due course to obtain payment, and to give notice of non-payment to the person from whom they received it, under the penalty of the same being considered complete payment. That the statute was for this purpose in aid of the law-merchant, which already provided notice to such as were parties to the bill. And he referred to *Bishop* v. *Rowe*. (*a*)

Lord ELLENBOROUGH C. J. The defendant was not entitled to notice, because he was not a party to the bill. The statute does not require notice to be given to strangers; and as to its operating to make the bill complete payment, I cannot consider that the bill was accepted in satisfaction of the debt; it was perfectly collateral; if it had been paid, well; not being so, the debt remains.

BAYLEY J. There was positive evidence by *Chesner* that he never could have paid the bill, and therefore the defendant could not have suffered for want of notice.

Per Curiam, Rule refused.

(*a*) 3 *M. & S.* 362.

Thursday, May 2d.

CHAMIER and PLESTOW *against* CLINGO and WILLETT.

A judgment in ejectment upon the several demises of two was held to be evidence to support trespass *quare claus. freg.* brought by them jointly.

TRESPASS, *quare claus. freg.* situate in *Hockwold cum Wilton*, *Knight's Fen*, *Redmore*, and *Hilgay*, in *Norfolk*. Plea, general issue. Secondly, *liberum tenementum* of the defendant *Willett*. Issue thereon. At the trial before *Wood* B. at the last *Norfolk* assizes, the plaintiffs produced an office-copy of a judgment in ejectment against the defendants and others for lands situate as above upon the *several* demises of the plaintiffs, and proved possession to have been delivered to their agent by the sheriff's officer, under a writ of possession and warrant. There was a verdict for the plaintiffs.

And now *Blosset* Serjt. moved to set aside the verdict upon an objection, which was made and overruled at the trial, viz. that there being no joint demise by the plaintiffs in the declaration in ejectment, but only a several demise by each, in separate counts, there was nothing to shew them intitled to maintain trespass jointly.

But the Court said that the judgment in ejectment upon the several demises of the two plaintiffs was perfectly consistent with their being tenants in common, in respect of which they might maintain trespass jointly.

To which *Blosset* answered that then the plaintiffs ought to have shewn that they were tenants in common; for the second count in the ejectment being for *other* lands,

lands, *prima facie* imports that they recovered separate lands upon separate counts. 1816.

CHAMIER *against* WILLETT.

But HOLROYD J. said that without doubt though the second count has the word *other*, yet the plaintiffs as tenants in common might each have recovered his moiety of the same lands upon the separate counts. And *per Curiam*, The judgment in ejectment affirmed some title to the lands in both plaintiffs, which may well consist with a tenancy in common. So the rule was refused.

HIGHMORE *against* PRIMROSE.

Thursday May 2d.

A bill of exchange drawn by J. S. to his own order value received, means value received by the drawee, and if it be alledged in the declaration to be for value received by the said J. S. it is a variance. Proof of the acknowledgement of one item of debt only is good to support a count upon an account stated.

ASSUMPSIT on a bill of exchange. The plaintiff declares that one *J. S.* made his bill of exchange, &c. and directed it to the defendant, whereby he required the defendant two months after date to pay *to the order of the said J. S.* 29*l.* 12*s.*, *value received by the said J. S.*, which bill the defendant afterwards accepted, &c., and *J. S.* indorsed to the plaintiff, &c., in consideration of which the defendant promised to pay, &c. And there were counts for money lent, money paid, money had and received, and *upon an account stated.* Plea non assumpsit.

At the trial before Lord *Ellenborough* C. J. the bill was proved and appeared to be drawn by *J. S.* in this form, "Two months after date pay to my order 29*l.* 12*s.* value received." It was also proved that the defendant upon being applied to for payment of the bill admitted it to be his, but alleged his inability to

1816.

HIGHMORE *against* PRIMROSE.

pay at that time. It was objected that the plaintiff could not recover on the first count by reason of a variance, the count describing the bill as drawn for value received by the drawer, the words "value received," in the bill itself importing value received by the drawee; secondly, that the defendant's admission being confined to one item, viz. the bill, the evidence was not sufficient to sustain the count upon an account stated. And these points being reserved, a verdict was given for the plaintiff. A rule nisi for a nonsuit having been obtained in the last term,

Bowen who now shewed cause, relied upon *Grant* v. *Da Costa* (*a*) in answer to the first objection; and on *Knowles* v. *Michel* (*b*) in answer to the last.

Topping contra referred to a N. P. case, the name of which he was unable to give, lately before Lord *Ellenborough* C. J., in which his Lordship (he said) had refused to permit the plaintiff to go into evidence on the count upon an account stated, because the evidence only applied to one item. And upon the first point, after premising that this being a written instrument it ought to be set out according to its true substance and meaning, he denied that there was any analogy between the present case and the case relied on *contra*. For in that case the bill was drawn to the order of a third person; wherefore the words "value received" might well be referred to value received of that person by the drawer; but here the bill being drawn to the drawer's own order

(*a*) *Ante*, vol. iii. 351.

(*b*) 13 *East*, 249.

the

the analogy, if any exist, would be that it is for value received by *J. S.* of *J. S.*, which is absurd. 1816.

HIGHMORE *against* PRIMROSE.

Lord ELLENBOROUGH C. J. I think the argument of Mr. *Topping* is strong in favour of the defendant upon the first point. Certainly when a man calls upon another by a bill of exchange to pay to his own order, not naming any payee, a sum of money for value received, he cannot be supposed to mean value received of some person in blank, who shall be hereafter ascertained as indorsee; the fair import of the language is that in calling upon the drawee to pay to his order, he intends to put the drawee in mind of the duty which he owes from having received value for it. The argument therefore seems to me to be with the defendant upon the question of variance. But upon the other point I think *Knowles* v. *Michel* is an authority to shew that though in form a count upon an account stated is "of and concerning divers sums of money," yet proof of one item is good to maintain such a count; *divers* may be supported by evidence of one. The practice I believe has been so, and if there is any variation from it, it has arisen from not attending to the form of the count. The count does not import a mutuality of account, and there seems to be no reason why an account should not be stated consisting of one item only as well as a plurality.

BAYLEY J. I agree that the bill is misdescribed in the declaration; but upon the account stated the plaintiff is entitled to recover. I consider *Knowles* v. *Michel* to have established this point. In that case the evidence went only to the admission of a single debt, yet the Court

 held

1816.

HIGHMORE *against* PRIMROSE.

held it sufficient. In the case alluded to by Mr. *Topping* I should think there must have been some defect in proof as to the acknowledgment of the debt. I remember a case before Mr. Justice *Buller* where the only proof was the acknowledgment of a particular debt, and I recollect his saying "that will do well enough upon an account stated."

HOLROYD J. I am of the same opinion. It has been held that upon a count for goods sold and delivered the plaintiff may prove the sale of one article, and that will be well enough. The same rule applies to this count, which is "of and concerning divers sums," as to the count for goods sold. If the count be good, it is enough if the plaintiff prove any part of it.

Rule discharged.

Saturday, May 4th.

BRAY and Others *against* HADWEN.

A country banker, with whom a bill of exchange, payable in *London*, is deposited, has an entire day after receiving notice of its dishonour to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough: therefore where the indorsee of a bill payable at a banker's in *London*, deposited it with his bankers in the country, who caused it to be duly presented for payment on the 14th, when it was dishonoured, and notice sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th (being *Sunday*), and they on the next day sent notice by the post to the indorsee, but not before twelve at noon, at which time the post set out for the place where the indorsee resided: Held that this notice was within time.

AT the trial of this cause before *Graham* B. at the last *Devon* assizes, the action being by the plaintiffs as indorsees against the defendant as indorser of a bill of exchange, the question was, if sufficient notice of the dishonour of the bill had been given to the defendant. The bill was payable at a banker's in *London*, and became due on the 14th of *July* 1814, and was presented on that day about twelve o'clock,

and

1816.

BRAY *against* HADWEN.

and dishonoured. The bill was returned with notice of its dishonour by the post on the 15th to *Glyn* and Co. bankers at *Launceston*, with whom the plaintiffs had deposited the bill as their bankers. The letter reached *Launceston* on *Sunday* morning the 17th. And on *Monday* the 18th *Glyn* and Co. sent notice by the post to the plaintiffs at *Tavistock*, where they resided, and the plaintiffs afterwards forwarded notice to another indorser who gave notice to the defendant. The post from *London* to *Launceston*, arrives at *Launceston* at eight o'clock in the morning, and letters are delivered in about half an hour, and the post from *Launceston* to *Tavistock* leaves *Launceston* at twelve at noon, allowing an interval of about four hours. The letter which the bankers at *Launceston* put into the post on the *Monday*, to the plaintiffs at *Tavistock*, was not put in until after twelve o'clock, after the departure of the post, in consequence of which it did not go from *Launceston* till the next post, nor reach *Tavistock* before the morning of the 20th; whereas, if it had been sent to the post before twelve o'clock on the *Monday* it would have reached *Tavistock* on the morning of the 19th. And the question was, whether the *Launceston* bankers should not have apprized the plaintiffs by the earliest possible post, that is, by sending the letter to the post on *Monday* before twelve o'clock, or whether they had the whole of *Monday* to do it. There was also another question, whether the plaintiffs should not have given notice immediately to the defendant instead of giving it to another indorser, and through the medium of that indorser to the defendant. The learned Judge ruled in favour of the plaintiffs

 upon

1816.

BRAY *against* HADWEN.

upon both points, and there was a verdict for the plaintiffs.

Lens Serjt. moved for a new trial, and referred to the rule laid down by Lord *Alvanley* in *Haynes* v. *Birks* (*a*), that a banker is bound to give notice to his principal the very day of the dishonour, if he can do so by using ordinary diligence. Here, allowing the *Launceston* banker to pass over *Sunday* (*b*) without giving notice, yet by using ordinary diligence on the *Monday*, he might have given notice by the post of that day, instead of waiting till the *Tuesday*'s post. And to this point the language of Lord *Ellenborough* in *Darbyshire* v. *Parker* (*c*), is extremely strong; for though his Lordship was inclined somewhat to relax the rule, yet, said he, "if there be reasonable time between the coming in and going out of the post on the same day, (as in that case there were four or five hours,) it would be a material question whether the party were bound to communicate by the next post the intelligence he had received by the post on the same day."

Lord ELLENBOROUGH C. J. It has been laid down, I believe, since the case of *Darbyshire* v. *Parker*, as a rule of practice, that each party, into whose hands a dishonored bill may pass, should be allowed one entire day for the purpose of giving notice (*d*); a different rule would subject every party to the inconvenience of giving an

(*a*) 3 *Bos. & Pull.* 601.
(*b*) See 2 *Campb. N. P. C.* 602. *Lindo* v. *Winsworth*.
(*c*) 6 *East*, 3.
(*d*) See *Scott* v. *Lifford*, 9 *East*, 347., and *Langdale* v. *Trimmer*, 15 *East*, 291.

6 account

1816.

BRAY *against* HADWEN.

account of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it. This rule is, I believe, in conformity with what *Marius* states upon the subject of notice, and it has been uniformly acted upon at *Guildhall*, by this Court, for some time. It has moreover this advantage, that it excludes all discussion as to the particular occupations of the party on the day. As to the objection that notice was not given by the holders immediately to the defendant, it was given by one who was an indorser, and not by a stranger, which is enough to satisfy the allegation that the defendant had notice.

Rule refused.

YORK and Another *against* BLOTT.

Saturday, May 4th.

One joint-maker of a promissory note is a witness to prove the signature of the other.

ASSUMPSIT on a promissory note made by the defendant. Plea *non assumpsit*. At the trial at the last *Huntingdon* assizes, it appeared upon production of the note that it was made by the defendant and *T. S.*; and the plaintiffs called *T. S.*, an uncertificated bankrupt, who acknowledged his own, and proved the defendant's signature to the note. And upon objection taken to the competency of *T. S.* to give such proof, by reason of the interest which he had to cast the liability on the defendant, and discharge his own estate, the objection was over-ruled, and the plaintiffs had a verdict for 250*l*.

And now *Blosset* Serjt. having renewed the objection upon a motion for a new trial, it was resolved, upon

1816.

York *against* Blott.

the authority of *Lockhart* v. *Graham* (*a*), that *T. S.* might well be allowed to be a witness to prove the handwriting of the defendant to the note; and the reason given was, that if the plaintiffs recovered against the defendant, *T. S.* would be liable to him for contribution; or if they failed in this action, they might resort to *T. S.* for the whole, and then *T. S.* would be entitled to contribution from the defendant; so that *quâcunque viâ T. S.* stood indifferent.

So the rule was refused.

(*a*) *Str.* 35.

Saturday, May 4th.

Doe, dem. Cookson, *against* W. Thorp.

Entries in the minute-book of the Quarter Sessions for *London*, that *J. T.* was a prisoner (on a day certain) for debt in the *Fleet* prison, and was discharged, and that *C.* was chosen assignee of his estate, together with proof of the assignment, and that *J. T.* took the oath prescribed by the 51 G. 3. c. 125. (Insolvent Act) upon being discharged, were held sufficient to support the title of *C.* claiming in ejectment as assignee of the estate of *J. T.* under the said act, without proving that *J. T.* was a prisoner on the day mentioned in the said act.

At the trial of this ejectment before *Graham* B., at the last assizes for the county of *Southampton*, the lessor of the plaintiff claimed the premises as assignee of the estate of *John Thorp*, an insolvent debtor; and in order to prove his title, the clerk of the peace for *London* produced the minute book of the Quarter Sessions, wherein was an entry, dated 18th *November* 1811, of the said *John Thorp* being a prisoner for debt in the *Fleet* prison, and in the margin was written the word "discharged." Another minute was also read, stating that the lessor of the plaintiff was chosen assignee, and the assignment from the clerk of the peace was proved. It was objected that this evidence of the insolvent's discharge was insufficient without proving that he was in custody on the 1st *May* 1811,

the

1816.

Doe, dem. Cookson, *against* Thorpe.

the day mentioned in stat. 51 *G.* 3. *c.* 125. (the insolvent debtors' act.) For since the justices at sessions had not jurisdiction to discharge insolvent debtors generally (*a*), but only such as were in custody on the 1st of *May* 1811, their jurisdiction to discharge this person ought to have been shewn, by proving that he was a prisoner on the day; in the same manner as the prisoner himself is allowed by the act to plead, that he was actually a prisoner on the said day (*b*), &c. The learned Judge over-ruled the objection, holding the evidence sufficient to warrant the presumption, that the sessions had jurisdiction; and it was farther proved that *J. Thorp* had taken and subscribed the oath pursuant to the act, upon being discharged. (*c*) There was a verdict for the plaintiff.

Gaselee now moved for a new trial, renewing the objection; and he agreed that if the evidence had once attached upon the sessions jurisdiction over the debtor, the presumption would have been well warranted, that they acted rightly in discharging him; but here, as he contended, lay the distinction, because nothing can be presumed in favour of a court which has not jurisdiction; and unless this debtor was a prisoner on the day mentioned in the act, the justices in sessions had no jurisdiction. Wherefore proof of that fact was indispensable. And as to its being proved that the insolvent had taken the oath, this might be good evidence as against him to shew that he was properly discharged, but cannot affect the defendant.

(*a*) *Brown* v. *Compton*, 8 *T. R.* 424. (*b*) *S.* 32. (*c*) *S.* 12.

Lord

1816.

Doe, dem. Cookson, against Thorp.

Lord Ellenborough C. J. I am very much inclined to think, that as to all which was done at the sessions, we ought to presume *omnia rite acta*. The assignee claims under a person who was discharged at the sessions; we find by authentic entries that he was so discharged, and that he acquiesced in such discharge by taking the oath. As far as his rights are concerned, this was evidence to shew a transfer of them.

Bayley J. The title was in *J. Thorp*, but in order to shew it out of him, and vested in the assignee, it was proved that it was assigned to the assignee under the insolvent act, and that *J. Thorp*, by his own act, availed himself of the discharge. In the case alluded to, it appeared that the sessions had no jurisdiction.

Abbott J. It seems to me that the evidence was sufficient to cast upon the assignee the title which was before in the insolvent.

Holroyd J. This appears to be a good transfer of the title from the insolvent to the assignee.

Rule refused.

1816.

DOWTHWAITE *against* TIBBUT.

Monday, *May* 6th.

Where upon demand made of payment of seaman's wages, accrued during the *Russian* embargo, the defendant answered, "that he would not pay; there were none paid, and he did not mean to pay unless obliged:" this was held sufficient to take the case out of the statute of limitations.

IN assumpsit for seaman's wages, to which the statute of limitations was pleaded, the question at the trial before Lord *Ellenborough* C. J. at the last *Middlesex* sittings was, whether the evidence was sufficient to take the case out of the statute. The plaintiff served as mate on a voyage to and from *Russia* in 1800, and the demand was for wages for that service, which took place during the *Russian* embargo. The witness who proved the making a demand of payment on the defendant, proved also that the defendant answered to such demand, "*I will not pay; there are none paid, and I do not mean to pay unless obliged,* you may go and try." There was a verdict for the plaintiff.

Knox moved to enter a verdict for the defendant, because the evidence did not shew any acknowledgment by him that the debt existed, but only that similar demands had not been paid; and there was not any authority for depriving a party of his plea under the statute where there had not been some recognition on his part of the debt.

Lord ELLENBOROUGH C. J. Lapse of time furnishes a statutable presumption that payment has been made; but this may be rebutted by the party's acknowledgment that he has not paid; and here, as it seems to me, the defendant does not deny the debt, but alleges as the reason for its being unpaid, that no demand of the like

1816.

DOWTHWAITE *against* TIBBUTT.

like sort had been paid. If the decision of this Court in *Beale* v. *Thompson* (*a*) was right, there clearly was a good demand against him.

BAYLEY J. There is an admission by the defendant that the debt existed, if by law it might exist. The statute of limitations proceeds upon the supposition that the debtor has paid, but after a lapse of time may have lost his voucher; and therefore, where he acknowledges that the debt has not been paid, it takes the case out of the statute.

ABBOTT J. Here is proof that the service had been performed by the plaintiff, and the defendant acknowledged that it had not been paid for; which has been held sufficient to take the case out of the statute.

Per Curiam, Rule refused.

(*a*) 4 *East*, 546.

Monday, May 6th.

GERVIS and Others, Assignees of ABRAHAM, a Bankrupt, *against* The Company of Proprietors of the GRAND WESTERN Canal.

A writ of supersedeas, reciting that a commission of bankruptcy issued on a day certain, is evidence to shew that such a commission issued on that day.

DEBT for money had and received. General issue. At the trial before *Graham* B. at the last assizes for *Devonshire* the case was thus:

Abraham being indebted to the defendants in a large sum of money, for calls on several shares which he held, the defendants brought an action against him, and having recovered took out execution, which was levied

on

1816.

GERVIS *against* The GRAND WESTERN Canal Company.

on the 18th of *December* 1812. The commission of bankruptcy under which the plaintiffs were chosen assignees was founded on an act of bankruptcy in *October* 1812, but did not issue until the 14th of *April* 1813, so that the defendants' execution would have been protected by the 49 *Geo.* 3. *c.* 121. s. 2. The plaintiffs, however, in order to bring the case within the proviso in that clause, produced in evidence a writ of supersedeas under the great seal; which recited that a commission, bearing date the 24th of *November* 1812, had issued against *Abraham*; and this, it was contended, was evidence not only of the issuing of the commission, but of the time of its issuing; and so by the proviso in the clause above referred to, this was to be deemed notice of a prior act of bankruptcy. On the other side it was insisted, that as between the parties to this record the writ of supersedeas was not sufficient to prove the fact that a prior commission was issued; and at all events was insufficient to prove the time when that commission issued; of which the commission itself was the best and only evidence. The learned Judge ruled, that the evidence was admissible for both purposes, but gave leave to the defendants to move; and there was a verdict for the plaintiffs.

Casberd now moved to enter a nonsuit, upon the objection made at the trial; and he urged, that here the defendants being strangers to the writ, it was only evidence as against them that a supersedeas had issued, but the plaintiffs ought to have given in evidence the commissson; though it would have been otherwise if the defendants had been privy to that commission.

And

1816.

Gervis *against* The Grand Western Canal Company.

And he cited *Lake* v. *Billers* (a), *Martyn* v. *Podger* (b), and *Watkins* v. *Maund*. (c)

Lord Ellenborough C. J. A commission of bankruptcy is not like a *fieri facias*, but is considered in law as a proceeding to which all the world are parties.

Bayley J. I think this was *primâ facie* evidence at least. If the defendants had searched and found that there was not any such commission, that would have afforded ground for applying to the Court upon affidavit.

Abbott J. A recital of an ancient charter in a modern charter is evidence. The writ of *supersedeas* having no other object but to supersede the commission, I think it was evidence to shew that a commission issued.

Holroyd J. The commission exercises jurisdiction over the thing itself: it is like proceedings *in rem* in the Exchequer.

Rule refused.

(a) 1 *Ld. Raym.* 733. (b) 5 *Burr.* 2631.
(c) 3 *Campb. N. P. C.* 308.

1816.

CASE *against* DAVIDSON and Others.

Tuesday, May 7th.

An abandonment to the underwriter on ship transfers the freight subsequently earned as incident to the ship. Therefore where ship and freight were insured by separate sets of underwriters, and the ship being a general ship, was captured, and ship and freight were abandoned to the respective underwriters, who paid each a total loss; and the ship being recaptured, performed her voyage and earned freight; which was received by the defendant for the use of those who were legally entitled thereto: Held, that the underwriter on ship was entitled to recover.

ASSUMPSIT for money had and received, and the money counts. Plea general issue. On the trial before Lord *Ellenborough* C. J. at *Guildhall* in *Trinity* term 1815, there was a verdict for the plaintiff for 71*l.* 12*s.* 10*d.* damages, subject to the opinion of the Court upon the following case:

Messrs. *Brotherston* and *Begg* were owners of the vessel called the *Fanny*, which was a general seeking ship, and sailed on a voyage from *Rio de Janeiro* to *Liverpool* with a cargo of goods on freight, the property of different persons. On the 27th *January* 1814 Messrs. *Brotherston* and *Begg* insured the vessel on the said voyage, valued at 7000*l.*; and on the 22d *April* following they insured the freight of the said voyage by other policies and with other underwriters, and valued the same at 4000*l.* The vessel with the cargo was captured in the course of the voyage by an *American* privateer, and thereupon Messrs. *Brotherston* and *Begg* gave notice of abandonment at the same time to the respective underwriters on ship and freight, who severally accepted the same. Afterwards the vessel was recaptured by one of his Majesty's ships of war, was brought to *London*, and was by decree of the High Court of Admiralty restored to the owners with the cargo, on payment of salvage and expenecs. The vessel arrived at *Liverpool* and delivered her cargo and earned the freight. It was agreed between the ship-owners and the underwriters on ship, (but not by the underwriters on freight,) that the defendants should sell the ship and receive the proceeds there-

1816.

CASE against DAVIDSON.

thereof, and should also receive the freight of the cargo for the use and benefit of all persons respectively who should legally be entitled to it. The underwriters on ship and freight severally paid or satisfied the ship-owners for a total loss. The underwriters on ship paid the loss on ship before the underwriters on freight paid the loss on freight. The defendants received and paid to the underwriters on ship the amount produced by the sale of the ship, which was about 33*l.* per cent. on their subscriptions. The defendants also received the freight, which they held under the terms of the agreement, and which is 35*l.* 16*s.* 5*d.* per cent. clear on the sum insured on the ship. The underwriters on ship and also the underwriters on freight severally claimed from the defendants the freight thus received. The plaintiff is an underwriter on ship to the amount of 200*l.*, and claims to recover a proportion of the money received by the defendants for freight. The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If he is entitled, the verdict to stand, otherwise a nonsuit to be entered.

This case was argued partly in last term, and partly on this day, by *Richardson* for the plaintiff, and *Littledale* for the defendants. For the plaintiff two points were made, first, that the abandonment of ship conveyed to the underwriter on ship the ship's future earnings; secondly, that the underwriter's title to the earnings was not affected by an abandonment to the underwriter on freight. In support of these propositions were cited the cases of *Thompson* v. *Rowcroft* (*a*),

(*a*) 4 *East*, 34.

Leatham

1816.

CASE against DAVIDSON.

Leatham v. *Terry* (*a*), *M'Carthy* v. *Abel* (*b*), *Sharpe* v. *Gladstones.* (*c*) And *Chinnery* v. *Blackburne* (*d*), *Splidt* v. *Bowles* (*e*), *Morrison* v. *Parsons* (*f*), were referred to *arguendo*, as shewing, that by an assignment of the ship, the freight passes to the assignee, and payment of it to him will be good; though if the ship be chartered the assignee cannot, by reason of a technical rule of law, maintain an action for the freight in his own name.

For the defendants it was urged, that as by the law of *England* freight might be made a distinct subject of insurance from ship, the law would so mould these contracts, where they concurred, as to preserve the rights of the respective parties distinct; and apply to each what properly belonged to it. Wherefore an underwriter on ship who insures but the hull, materials, body, tackle, and apparel of the ship, shall not, by an abandonment, be entitled to the earnings; for this would be to confound the two species of abandonment, and would render an abandonment of freight of no avail. It is true indeed, that the beneficial interest in the freight passes by assignment of the ship; the reason of which is, because upon the purchase and sale of a ship, both parties intend, that not only the body of the ship, but all its incidents should pass, and agree upon a price accordingly; whereas a contrary intention seems necessarily to arise, where there is a separate abandonment of ship and freight. Abandonment, therefore, differs from a transfer of the ship upon a sale, and extends no farther than to the thing insured.

(*a*) 3 *Bos. & Pull.* 479. (*b*) 5 *East*, 388. (*c*) 7 *East*, 24.
(*d*) 1 *H. Bl.* 117. *in not.* (*e*) 10 *East*, 279. (*f*) 2 *Taunt.* 407.

1816.

CASE *against* DAVIDSON.

Lord ELLENBOROUGH C. J. Although this question now comes distinctly in judgment before us for the first time, yet it has, I own, been long considered, in my mind, as settled, that freight follows, as an incident, the property in the ship; and therefore, as between the respective underwriters on ship and freight, an abandonment of the ship carries the freight along with it. This subject was much under discussion at the time of the *Russian* embargo, when the rights of the respective sets of underwriters were considered. I believe it was at that time said, that an abandonment to the underwriters of ship, like the *traditio rei*, divested the owner of all his rights in favour of the party to whom he abandoned. The underwriter, indeed, does not become privy, by virtue of such abandonment, to any existing charter-party, nor perhaps to any contract of affreightment before made with the owner; but I think that by the abandonment, he acquires possession of the thing, from the use of which freight is to be earned. It is true, that the ship owner may have entered into contracts for the insurance of freight, and that by abandonment of ship, the underwriters on freight will be deprived of some rights to which they would perhaps otherwise be entitled; but this will necessarily happen, if the underwriter on ship is entitled to look, without reference to the contracts of other persons, to his own contract, and to those consequences which result to him from abandonment. An abandonment to the underwriter on ship, transfers to him not merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage. If, upon the completion of the voyage, the abandonee may withhold the goods until the freight is paid, he must have acquired an indefeasible

1816.

CASE *against* DAVIDSON.

defeasible title to it. I consider his title as derived out of the use of the ship. It is true, that by the usage of this country, the ship owner may insure his freight, but that is not to interfere with the insurance on ship; the underwriter on ship is to have his rights entire, which are not to be affected by other contracts that the ship owner may think proper to engage in; and, after abandonment, the underwriter on ship is the person to be considered in possession. In the present case, the voyage has been completed, freight has been earned, and has been received by the defendants, for the use of such persons as are entitled; and the question is, who those persons are; to which I answer, the person whose ship earned the freight, and that is the abandonee. This subject has been, on several occasions, in the mind of the Court, but more particularly in *Sharpe* v. *Gladstones*, and *Morrison* v. *Parsons*; and what was said in the latter case by *Lawrence* J., namely, that the right to freight subsequently accruing, must belong to the assignee of the ship, as incident thereto, was not new doctrine at that time, but had been intimated before by that learned judge, as his opinion; indeed, there seems to have been a concurrence of opinion in *Westminster Hall* upon that point. The underwriter on freight, will certainly, by this doctrine, lose the specific thing abandoned to him, except where the assured is entitled to the freight; but abandonment of the freight cannot break in upon the rights of those who are entitled to the ship. And I own it seems to me, that it cannot make a difference, whether the underwriter on ship has or has not notice of the insurance on freight; for I rest on this simple ground, that the abandonee of ship, has all the rights of the ship owner cast upon him,

 by

1816.

CASE *against* DAVIDSON.

by operation of that emphatic word in the law-merchant, "abandonment;" and being so entitled, has a right, if he uses the ship for completing her voyage, to her earnings, as against all the world. Who are the persons liable to pay the wages, I do not think is a question here; very likely the sailors might libel the ship, and the abandonee might be liable.

BAYLEY J. I think this is a question of considerable difficulty, and it has made a different impression on my mind from that of my Lord, and I believe the rest of the Court. We have considered the subject a great deal before we arrived at this stage of the case, and seeing that we are not likely to come to an unanimous agreement upon it, it is better that we should declare our opinions without farther delay. This is an action by the underwriter on ship, against a person who has received and holds the freight for the use of the party entitled to it. At one period of the adventure, there was a capture, and there was a contemporaneous abandonment to the respective underwriters of ship and freight. The ship was afterwards re-captured, and completed her voyage, and ultimately earned freight; and the question is, if the underwriter on ship is entitled to have ship and freight, or only the ship; and the underwriter on freight to have the freight. Now the impression of my mind is, with deference to my Lord, that an abandonment of ship, under such circumstances, from the nature of the subject matter, implies a virtual exception of the freight. Where ship and freight are comprehended, as is most usual, in one insurance, they are insured as one entire subject; but where the insurance is separate, they ought to be considered, to the termination of the

 adven-

1816.

CASE *against* DAVIDSON.

adventure, as separate subjects. Freight is compounded of several considerations; it includes the wear and tear of the ship, the provisions and wages of the crew, and a reasonable return of profit to the owner for the employment of his capital. The underwriter on ship understands that he insures only the body, tackle, and apparel of the ship. I agree, that the ship owner, in ascertaining the value to be insured, includes in his calculation, not only the value of the ship, but also the expenses of the outfit; and this creates some difficulty, because when a loss happens, it is computed, I believe, upon the value at the time the ship set sail, and not at the time of the loss; and as this value is constantly diminishing as the voyage proceeds, it may be said, that the freight is no more than an equivalent for this decrease in value. Nevertheless, it seems to me, that the underwriter on ship, has no right to expect from an abandonment more than he has insured, that is, the hull, tackle, and apparel of the ship, in the plight in which she is at the time of abandonment. If the ship completes her voyage, it is so much saved to him. I am not sorry that the opinion of the Court is against me, for I think the consequence will be, that in future there never will be an abandonment of ship. If, by abandoning the ship, the assured must be deemed to have abandoned the freight, there cannot be any abandonment to the underwriter on freight; and the assured may be liable to the underwriter on freight for the freight. The mariners value on him for wages, and he is obliged to pay them. It is true, that they may proceed against the ship in the Admiralty Court, but they are not bound to go thither, and may sue the owner; and the master of the ship cannot go to the Admiralty

 Court.

1816.

CASE *against* DAVIDSON.

Court. That seems to me to place the ship owner in such a predicament upon abandonment, that it will not allow him for the future to make abandonment of ship. I do not quote the cases of *Sharpe* v. *Gladstones*, and *Barclay* v. *Stirling*, because they do not involve any question between the two sets of underwriters. But I ask, upon what principle is the underwriter on ship to be entitled to the freight? Suppose the ship to have performed nine-tenths of her voyage at the time of abandonment, the underwriter, if entitled to the freight, will receive the whole benefit and earnings of the voyage, although he is only at a few days expense for provisions. This would be the consequence of its being understood, that by abandonment of ship, it is the intention of the assured to abandon all the rights belonging to her. If this is to be taken as the intention, I agree that the underwriter is entitled to the growing freight; but it seems to me, from the nature of an abandonment, and from the constant practice which has prevailed, of insuring freight separately, that it must have been the understanding of these parties, that an abandonment of the ship should not carry with it the freight. If this be not so, it is wonderful that the question has never been raised, so as to settle the right of the abandonee of ship to the freight. For these reasons, I think the plaintiff is not entitled.

ABBOTT J. I am of opinion that the plaintiff is entitled to recover. The question comes now for the first time to be decided, but it is not new to the Court; an opinion has been expressed upon it in several cases. Nor is it by any means a new point to the minds of professional men, who have been at all conversant with the

1816.

CASE *against* DAVIDSON.

the law-merchant. Now this is a principle clearly established, that if the ship be sold, the vendee is entitled to the freight as an incident to the ship. And on that principle I found my judgment in this case, being of opinion that an abandonment is equivalent to a sale of the ship. And considering freight to be an incident, I cannot engraft upon the effect of an abandonment any exception, but take it to be a complete transfer of all the rights which are consequent upon a sale of the ship. It was argued by Mr. *Littledale*, that since a practice has prevailed in this country of insuring ship and freight separately, the underwriter on ship must contemplate that inasmuch as freight may be the subject of a separate insurance, it may also be separately abandoned. But this argument is built upon an assumption that an abandonment of freight conveys to the abandonee a right to the freight in préference to the right of the abandonee of ship; which is assuming the whole question. As well might it be argued, that as the underwriter on freight is aware that the ship may be separately insured, he must therefore be taken to know that an abandonment of the ship will convey all the incidents belonging to it to the abandonee. The practice, therefore, of insuring ship and freight separately seems to me to afford no argument whatever either way to shew what the law is or ought to be. If it had been the practice, that upon separate insurances the abandonee of freight should take the freight notwithstanding an abandonment of the ship, such a practice might have afforded a construction; but we do not find that there has been any such practice. It was further contended by Mr. *Littledale*, that supposing this freight had not been insured, the ship owner and not the underwriter on ship would have

been

1816.

CASE *against* DAVIDSON.

been entitled to it after abandonment of the ship; but I did not observe that he cited any authority for this position; and the practice, I believe, has been the other way. I have never heard of an instance in which the assured, after abandoning the ship to the underwriter, has stepped in and claimed the freight as against the underwriter; on the contrary, the practice has been uncontested that the abandonee has received the freight. It may perhaps be a question, as between the underwriter on freight and the ship owner after abandonment, to whom the freight belongs; but this question it is unnecessary at present to touch. It has been observed that nothing is to be found in the foreign writers in favour of this claim of the underwriter on ship. Foreign writers, I am aware, are not to be stated as authorities in this Court; but I find one learned foreign writer in commenting on the 15th article, tit. *Insurance* (*a*), which prohibits the insurance of freight, is of opinion that freight is an incident to the ship, and must, from its nature, follow it. And he puts an instance of a voyage to the *West Indies*, where it is usual to stipulate for the freight on putting the goods on board. He then supposes that the ship is lost in the voyage, and that the goods are saved in part or in whole; and concludes that the ship owner, in making abandonment, is bound to answer to the underwriter for so much of the freight as is received. A stronger mode of illustrating his opinion that the freight accompanies the ship cannot be put. Although I do not quote this as an authority, yet it is satisfactory to know that my opinion concurs not only with that of other

(*a*) *Valin, Liv.* III. tit. 6. *Des Assurances*, Art. 15.

Judges,

Judges, but also with that of foreign writers upon this subject. 1816.

CASE *against* DAVIDSON.

HOLROYD J. I am also of opinion, that the plaintiff is entitled to recover, and I would adopt the same line of argument that has been taken by my Lord and my Brother *Abbott*. It appears to me that when the ship owner abandons his ship to the underwriter, the latter stands in all respects as to future benefit in place of the owner. The underwriter pays the whole loss, and in consequence becomes *quasi* owner instead of the former owner. It follows as a consequence of abandoning the ship that the owner divests himself of his right to freight, which is incident to the ship, and the same becomes vested in the abandonee, to whom it is competent to possess himself of the ship, and if she should be unfreighted to endeavour to obtain for her a freight. And if the ship be freighted, yet, as it seems to me, the underwriter is not bound to complete the voyage, because the rights of the owners of the goods laden on board are personal, lying in contract with the ship owner, and not running with the ship; and being in respect of a personal chattel, an action lies not against the underwriter, but against the owner alone. Put the case of a voyage from *London* to *Madeira*, or perhaps the *West Indies*; an insurance is effected from *London* to the *West Indies*, with leave to touch at *Madeira*; a loss happens before the ship reaches *Madeira*, and the assured abandons; is not the underwriter entitled to the freight if he carries on the goods to the *West Indies?* I apprehend he is; for otherwise it would follow that he could not possess himself of the ship until her return home. Upon these grounds it appears to me

1816. me that the abandonee becomes entitled immediately to all the earnings of the ship as a consequence of the abandonment.

CASE *against* DAVIDSON.

Judgment for the Plaintiff.

Note, That on the last day of this term the Court gave leave to turn this case into a special verdict.

Wednesday, May 8th.

The KING *against* The Inhabitants of ALL SAINTS, in DERBY.

Where pauper, by order of a corporation, made at a common-hall, was allowed the liberty to take sand and gravel from the bed of a river, (of which the corporation were entitled to the soil,) with a condition that he sold the sand to the inhabitants of the town at a certain rate; for which liberty he paid to the corporation at the rate of 10*l*. per ann.: Held that he thereby acquired a settlement.

UPON appeal the Court of Quarter Sessions quashed an order of two justices for the removal of *William Turner*, *Mary* his wife, and their four children, from the parish of *All Saints* to the parish of *Saint Peter*, both in the borough of *Derby*, subject to the opinion of this Court upon the following case:

The pauper *William* being legally settled in *St. Peter's*, was employed by the *Derby Canal* Company to clear away the sand in the river *Derwent*, which obstructed the navigation at the point where the canal crosses the river, for which employment he received no pay; the sand cleared away being sufficiently valuable to recompense him for his labour. When the pauper had been thus employed for two years, the steward of the corporation of *Derby* (who, as lords of the manor, had the right to the soil of the river) told him he must not continue his employment without their leave. He accordingly asked and obtained their permission, and for eight years more went on getting sand and gravel, not only in the point where the canal crossed the river, but in the whole space between the two weirs, being about two acres, without paying any thing. The steward

8 then

1816.

The KING *against* The Inhabitants of ALL SAINTS, DERBY.

then told him, that the sand and gravel which he got were so profitable to him, that he must pay the corporation 10*l.* a year for the liberty of getting them; and that he must sell the sand to the inhabitants of *Derby*, at a certain rate, which the steward mentioned; and he did this under an order of Common Hall of the corporation. The pauper got the sand and gravel accordingly, and to any depth he chose, for upwards of a quarter of a year, and paid 2*l.* 5*s.* to the corporation; but the steward being displeased with him for selling the sand to the inhabitants of *Derby* at a higher price than he had mentioned, the agreement was put an end to by mutual consent, about ten weeks after the expiration of the first quarter. During the whole time of the last agreement, the pauper resided in a house, and occupied a garden in *All Saints'* parish, of the yearly value of 8*l.* 1*s.* The only question made at the sessions was, Whether the liberty to get sand and gravel, under the above circumstances, was, in law, a tenement.

Clarke, *N. R. Clarke*, and *C. Moore*, argued that it was, and cited *Rex* v. *Old Alresford* (*a*), *Rex* v. *Piddletrenthide* (*b*), *Rex* v. *Tolpuddle* (*c*), contending that this was a contract to receive the profits arising out of land; and if a man grants the profits of land, the land itself shall pass.

J. Balguy and *Denman*, contrà, compared the employment of the pauper in taking the sand and gravel to that of a scavenger who removes the dirt, and afterwards makes a profit by the sale of it, for which he is

(*a*) 1 *Term Rep.* 358. (*b*) 3 *Term Rep.* 772.
(*c*) 4 *Term Rep.* 671.

con-

1816.

The KING against The Inhabitants of ALL SAINTS, DERBY.

content to pay a consideration; and yet no one ever imagined that his employment amounted to the renting of a tenement. Secondly, admitting this to be a tenement, it is of an incorporeal nature, extending only to a part of the profits of the land, like *prima vestura*, or *prima tonsura*, and therefore lies only in grant, and not in parol; and a mere occupation without title, is not enough to confer a settlement; *Rex* v. *Chipping Norton* (*a*), *Rex* v. *North Duffield.* (*b*)

Lord ELLENBOROUGH C. J. This was a tenement as it subsisted in the corporation, and the pauper is by their permission let into the enjoyment of it. I do not know that we are obliged to go into the title; certainly a corporation cannot demise except by deed, but we find the pauper in the occupation of the land by their permission, and this occupation must by fair intendment, be taken to have been an exclusive one, for otherwise it would have been reduced to a thing of no value; the corporation could not have used the land, without interfering with the pauper's right. The pauper seems to have been in the pernancy of the whole profits of the land; he took all which covered the surface of the land. It is therefore as much a tenement as *prima tonsura*. If the question turned upon the demise, I should feel difficulty; but I think that in point of pernancy and enjoyment, this must be considered as a tenement.

BAYLEY J. I think this was a tenement within the meaning of the act of parliament. The argument

(*a*) 5 *East*, 239. (*b*) *Ante*, vol. iii. 247.

is,

1816.

The KING *against* The Inhabitants of ALL SAINTS, DERBY.

is, that it cannot be a tenement unless the pauper had a complete control over the land for all purposes, as well as for the purpose of taking sand and gravel; yet we find that *prima tonsura*, which is an interest confined to the surface of the land, has been considered to be a tenement. With respect to the objection for want of title, here has been an occupation.

ABBOTT J. I have had some doubts upon this case, but upon the whole, it seems to me, that what was done, amounted to putting the pauper in possession of the soil; and I do not feel the objection to title, seeing that the pauper was in the enjoyment, and especially as this objection was not raised on the hearing of the appeal.

Per Curiam, Order of Sessions confirmed.

WHEELWRIGHT *against* JOSEPH.

May 9th. Thursday,

Where plaintiff held defendant to bail before the cause of action accrued, and afterwards discontinued and paid costs, and then arrested him *de novo* for the same cause, after it accrued; the Court discharged defendant on common bail.

THE plaintiff, in *November*, sold goods to the defendant to the amount of 1842*l.*, and in *December* arrested him for 1760*l.*, but afterwards finding that he had sold the goods upon a credit of three months, and had commenced his action before the time of credit expired, discontinued and paid the costs. In *April*, he again arrested, and held the defendant to bail for 1700*l.* upon the same cause of action, the defendant being then indebted to him in a larger amount. Whereupon the defendant obtained a rule nisi for delivering up the bail bond, and discharging him on common bail.

Campbell

1816.

WHEELWRIGHT *against* JOSEPH.

Campbell, who shewed cause, contended that by the practice it was settled, that where a plaintiff, having mis-conceived his action, moves to discontinue upon payment of costs, he may after the costs are taxed and paid (*a*), take out a new writ for the same cause, and have the defendant arrested *de novo*. (*b*)

Lord ELLENBOROUGH C. J. Wherever the second arrest appears to be vexatious, the Court will discharge the defendant upon common bail. The plaintiff is bound to know his own claim, and if he hold the defendant to bail for so large an amount as this, before the cause of action accrues, it can only be attributed to *crassa negligentia*; and this being so, it shall not be permitted to him to harass the defendant a second time.

BAYLEY J. Wherever the Court see that there are laches in the plaintiff, they will not suffer him to arrest the defendant a second time. And surely the plaintiff is guilty of laches, if it appear that he has arrested the defendant before the debt accrued due; a second arrest therefore would be vexatious.

Per Curiam, Rule absolute.

Scarlett was in support of the rule, and cited 3 *T. R.* 309.

(*a*) 2 *Str.* 1209. *Ante*, vol. iii. 153. (*b*) 2 *Wils.* 381. *Barnes*, 399.

DOE, on the Demises of WRIGHT and Others, *against* JESSON and Others.

Friday, May 10th.

Devise to *W.*, one of the sons of my sister *A. W.*, before marriage, for his natural life, and from and after his decease to the heirs of the body of *W.* lawfully issuing, in such shares as *W.*, by deed or will, shall appoint, and for want of such appointment, to the heirs of the body of *W.* lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such child; and for want of such issue, to my right heirs for ever: Held that *W.* and his children, who were born after the death of testator, took only estates for life.

EJECTMENT. Upon a special verdict at the *Stafford* assizes, it was found that *Ezekiel Persehouse* being seised in fee of a messuage, &c. and premises, by his will of the 24th *April*, 1773, devised the same "to "*William*, one of the sons of my sister *Ann Wright* "before marriage, *to hold for and during the term of* "*his natural life*, he keeping the same in tenantable "repair; and from and after his decease, I devise the "same *unto the heirs of the body of the said* William, "*lawfully issuing, in such shares and proportions as the* "*said* William *in and by any deed or writing, deeds or* "*writings, or in and by his last will and testament in* "*writing, to be by him duly executed in the presence of* "*three or more credible witnesses, shall give, direct,* "*limit or appoint*. And for want of such gift, direc-"tion, limitation, or appointment, then to the heirs of "the body of the said *William*, lawfully issuing, share "and share alike, as tenants in common, and if but "one child, the whole to such only child, and for want "of such issue, to my right heirs for ever." And the testator charged the same with the payment of an annuity of 20*l.* to his sister *Ann Wright*, with power of distress. The testator died; *W. Wright* entered, and afterwards married and had issue, and in conjunction with his eldest son, suffered a recovery.

The question was, whether by this devise *W. Wright* or his son was tenant in tail, for then by the recovery the plaintiff

1816.

Doe, dem. Wright, *against* Jesson.

plaintiff was barred: or if they were but tenants for life, then this recovery was a forfeiture of the estate.

And it was argued by *W. E. Taunton* for the plaintiff, that no more than an estate for life passed to *W. Wright*, with a vested remainder to his children for life, subject to be divested by the appointment of *W. Wright*. *Archer's* case (*a*), *Clerke* v. *Day* (*b*), *Waker* v. *Snowe* (*c*), *Law* v. *Davis* (*d*), *Doe* v. *Laming* (*e*), *Goodtitle* v. *Woodhull* (*f*), *Goodtitle* v. *Herring* (*g*), *Doe* v. *Goff* (*h*), were cited to shew that words which are properly words of limitation, as "heirs of the body, &c." may be construed to be words of purchase. That they were used in this sense by the testator, it was argued, was plain from the devise being to them in such shares as *W. Wright* should appoint, and in a more especial manner from the limitation to them *as tenants in common*. And *Doe* v. *Applin* (*i*) *Doe d. Candler* v. *Smith* (*k*), *Doe* v. *Cooper* (*l*), and *Pierson* v. *Vickers* (*m*), were distinguished from the present case, because of the general intent expressed in those cases, that the estate should not go over until a failure of all the issue.

For the defendants the four last cited cases were pressed in argument by *Sugden*, as being decisive in principle of the present case. He likewise cited among others, *Wharton* v. *Gresham* (*n*), *Roe d. Dodson* v. *Grew* (*o*), *King* v. *Burchall* (*p*), *Davie* v. *Stevens* (*q*), *Hodges* v. *Middleton* (*r*), *Seale* v. *Barter*. (*s*)

(*a*) 1 *Rep.* 66. (*b*) *Moor*, 593. (*c*) *Palm.* 359
(*d*) 2 *Ld. Raym.* 1561. (*e*) 2 *Burr.* 1100. (*f*) *Willes*, 592.
(*g*) 1 *East*, 264. (*h*) 11 *East*, 668. (*i*) 4 *T. R.* 82.
(*k*) 7 *T. R.* 531. (*l*) 1 *East*, 229. (*m*) 5 *East*, 548.
(*n*) 2 *Black. Rep.* 1083. (*o*) 2 *Wils.* 322.
(*p*) *Ambl.* 379. 4 *T. R.* 296. *n.* (*q*) *Doug.* 321.
(*r*) *Ibid.* 431. (*s*) 2 *B. & P.* 485.

Lord

1816.

Doe, dem. Wright, *against* Jesson.

Lord ELLENBOROUGH C. J. The only question is, whether the recovery suffered by *W. Wright*, was well suffered; and that depends on the effect of the words "heirs of the body;" if they can only be satisfied by construing them to give an estate tail to *W. Wright*, the recovery was well suffered, and the defendants are entitled to judgment: but if *W. Wright* had not an estate tail, then the recovery was not well suffered, and it was a forfeiture of his and his eldest son's estate; and in that case the plaintiff will be entitled to judgment. The case has been argued with great industry and learning; and I have looked into the cases cited; we are not however to draw the sources of our judgment from the mere language or construction of other wills differently compounded, but from the language and intention of the testator in the will before us, or as it is sometimes expressed, *ex visceribus testamenti*. And I feel bound, on reading this devise and the context, to say, that the words "heirs of the body," which, in their ordinary and natural sense, import an estate tail, mean in this instance, children only. The words of the will are as follow, (here his Lordship read the words of the will.) The question is, whether with this context, the words "heirs of the body" are to be understood in their ordinary sense, or as denoting children to take by purchase. First, there is a power of appointment to the heirs of his body; and in default of appointment, they are to take as tenants in common. Now a tenancy in common is inconsistent with the supposition that they were to take as tenants in tail by descent; where one would take the whole. Under a tenancy in common, all would take *uno flatu* their share in tail; under a tenancy in tail, each would take

1816.

Doe, dem. Wright, *against* Jesson.

by descent the whole *successive*. A tenancy in common, therefore, is certainly incompatible with an estate tail in W. *Wright*. The testator goes on, "and if but one child, the whole to such only child." Hence it follows, that if there were more than one, the testator supposed that it would go, not the whole to one, but *divisim*, to each a share; whereas, if he had meant a tenancy in tail, the whole in pernancy and interest would have gone to one. Thus it seems to me, that the testator has put his own construction upon the term "heirs of the body;" and that these words can only be satisfied by construing them to mean children, whom he has constituted tenants in common. And for want of such issue, the testator devises to his own right heirs; which limitation generally denotes an estate tail; but the words are "for want of *such* issue;" and "such" is a word of reference, throwing us back upon the antecedent words, which are explained by the context to mean, child or children: therefore, the devise over is for want of such children. The explanation of the words "such issue" is furnished by the context; the estate was not to go over on a general and indefinite failure of issue, but only on failure of described objects, viz. the children of *W. Wright*; and that is not a giving over on an indefinite failure of issue. This takes the present out of all that class of cases, where the devise over has been to take effect after a general failure of issue; here, the testator intends to devise over to take effect only after the failure of particular described objects of his bounty. It appears to me clearly, therefore, that this will gives an estate for life, no words of limitation being added to the devise to them, and the devise over not

being

1816.

DOE, dem. WRIGHT, *against* JESSON.

being a giving over after an indefinite failure of issue. This decision clashes with none of the cases: the recovery having been suffered under the supposition that *W. Wright* was tenant in tail, it was a forfeiture of his estate and of his son's, and the other tenants for life are entitled to recover. I do not go into the cases, because they do not apply to a will constructed as this is: we determine this case by the canons of construction, which the testator himself has furnished.

BAYLEY J. I am entirely of the same opinion, and I think by deciding this case in favour of the plaintiff, we do not trench on any decided case, or break in upon any rule of construction. The single question in this case turns upon the import of the words "heirs of the body," circumstanced as they are, and as we may collect their meaning from the context. I agree that where there is a limitation to the heirs of the body of a person who has an estate for life given him by the same will, these are *primâ facie* words of limitation, and enlarge the prior estate; and that in order to come to a contrary conclusion, it must be seen plainly that the testator used these words in a different sense. But if it is plainly seen that the testator used them in a different sense, then we are not at liberty to treat them as words of limitation. Where the same words occur in different parts of the same will, the rule is, that you are to give them the same meaning in the different parts; and if it turns out that they are used in one place where it is impossible that they can be used as words of limitation, this affords ground for concluding, that when the testator uses them again, he is using them in the sense as before. The words "heirs of the body," if used as words of limitation,

1816.

Doe, dem. Wright, *against* Jesson.

give no new interest to the heirs of the body, nor make them purchasers, but merely enlarge the ancestor's estate, giving him an estate descendible in a particular way. In the clause which contains a power of appointment, it is impossible that the testator can be using the words as words of limitation, enlarging *W. Wright's* estate, because the only construction they will admit of is, that *W. Wright* should not divert the course in which the estate should descend, but only divide it among the objects designated in such proportions as he should think fit. Had *W. Wright* executed the power, the persons taking under it must have taken as purchasers, and as purchasers only. Therefore, those words can never be taken in the sense in which they are commonly taken, that is, to enlarge the estate of the ancestor, but they must be understood as giving a new and distinct estate to the objects of that power as purchasers. If so, we have established the meaning of the words "heirs of the body" in one clause. Then we come to another clause; the testator says, for default of such gift, direction, limitation, or appointment, then to the heirs of the body of *W. Wright* lawfully issuing. Had he stopped there, the presumption would have been, that the testator, after having used the words, heirs of the body, where they could not have been intended as words of limitation, was again using them in the same sense; that is, not to enlarge the former estate, but to create estates by purchase. But we are not driven to the necessity of resorting to any presumption in order to construe the words of this will; because the testator proceeds to put his own construction upon them by directing that the heirs of the body shall take share and share alike, as tenants in common; which could never

1816.

Doe, dem. Wright, *against* Jesson.

never be if these words were intended as words of limitation. For heirs who take by descent, never take as tenants in common, nor share and share alike: that is impossible. If, therefore, we are to adopt the construction for which the defendants contend, and treat these words as words of limitation, we must strike out of the will the words "share and share alike," and "as tenants in common." But the rule is, that you are not to strike out any words, provided the whole may stand together; and here the whole may well stand together, provided the words "heirs of the body" be not treated as words of limitation. The case, however, does not rest here, for the testator adds, that "if there be but one child, the whole to such only child." By this it appears, that the testator was contemplating a different state of things from what he had before contemplated; that here he was providing for the case of a single child; in the preceding limitation he was providing for a plurality of children, and if so, there is an end of the case. For what occasion was there to mention the contingency of a single child, if the words "heirs of the body" had been used as words of limitation? That one child would have taken without any special direction that he should take. It is a rule, as I observed before, in the construction of wills, that you are not to reject any words, unless there be an apparent intention inconsistent with them. The construction which the Court now puts on the present words, construing them as words of purchase, as they must necessarily be in the first clause, gives effect to the whole. In the cases of *Doe* v. *Applin*, *Candler* v. *Smith*, *Cock* v. *Cooper*, and *Pierson* v. *Vickers*, there were two inconsistent intentions apparent upon the will;

1816.

Doe, dem. Wright, *against* Jesson.

there was an intention that the issue should take as purchasers, for they were to take as tenants in common; but there was also an intention that the estate should not go over until an indefinite failure of issue. The Court felt the incompatibility of these two intentions; and in order to prevent the estate from going over until a failure of all the issue, they held that the first taker must have an estate tail: being reduced to the necessity of striking out some words to further the one intention or the other, the Court thought the primary intention was, that the estate should not go over until a failure of all the issue. But in this case, I would ask, on what part of the will is it possible to lay the finger, and say, that the testator has expressed any intention inconsistent with the intention that the children should take as tenants in common? For "heirs of the body" may be understood to mean children, and the limitation over is for want of such issue; if, therefore, the words "heirs of the body" are used as words of purchase, and as synonymous with children, for want of such issue will mean, for want of such children when the life estates given to them shall be exhausted. It would be useless to travel through the cases; one of them which has been alluded to comes very near the question in this; I mean *Burnsall* v. *Davy*. (a) The reason assigned for the decision in that case was the same which was assigned in *Doe* v. *Laming*, that in the devises which included the limitation to the issue or heirs of the body a different course of descent was pointed out from that which would otherwise take place. These reasons induce me to think that we

(a) 1 *Bos. & Pull.* 215.

shall

1816.

DOE, dem. WRIGHT, *against* JESSON.

shall break in upon no case, and no precedent, in deciding that *W. Wright* took an estate for life only, that his children take also for life, that the recovery suffered by *W. Wright* and his son was a forfeiture of their life estate, and that the lessors of the plaintiff are entitled to recover. I am glad that the question is upon the record, so that if we have taken an erroneous view of this case, it will be open to the consideration of wiser and abler men.

ABBOTT and HOLROYD Js. declined giving any opinion, as they had been engaged in the case while at the bar.

Judgment for the Plaintiff.

TAYLOR *against* WATERS.

Friday, May 17th.

B. cannot, in an action brought against him by *A.*, set off a judgment recovered by him against *A.*, for which *A.* is charged in execution.

ASSUMPSIT for money paid, &c. Plea, non-assumpsit; secondly, set-off of money due upon a judgment recovered by the defendant against the plaintiff in *C. B.* Replication to the first plea similiter; secondly, that after obtaining the judgment, and before the commencement of this suit, and whilst the plaintiff was in custody of the marshal of the Marshalsea, the defendant sued out of *C. B.* a *Hab. corp. ad satisfaciendum* directed to the marshal, commanding him to have before the justices of *C. B.* on *Saturday* next after eight days of *St. Martin*, the body of the plaintiff to satisfy the defendant the said damages recovered by the said judgment. By virtue of which the marshal had the body, &c. and thereupon the plaintiff was *in due manner of law charged in execution upon the said judgment;*

1816.

TAYLOR *against* WATERS.

ment; as by the said Hab. corp. and return and commitment thereon remaining in the said court appears. And the plaintiff from the time of such commitment hitherto hath been, and still is charged in execution and detained in custody by virtue of such execution, &c.

Demurrer. Joinder.

Taddy in support of the demurrer, relied upon *Blumfield*'s case (*a*), to shew that the execution of the body is no satisfaction, but a gage for the debt. And the words of the *Capias ad satisfaciendum*, are "to have his body, &c. to satisfy plaintiff the debt." Wherefore the defendant might have had a new execution, if the plaintiff had died in execution; and in like manner he may set off the judgment against this action, because he has not been satisfied. (*b*) The statutes of set-off are remedial.

Lord ELLENBOROUGH C. J. The taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor; and in like manner precludes a set-off against him.

BAYLEY J. The taking him in execution, destroys all remedy against him during his life.

ABBOTT J. The case cited from Lord *Coke* would have been in point, if the plaintiff had died and this had been an action by his executor. The other two cases referred to, came on upon motion, where it was

(*a*) 5 *Rep* 86. *b.* Sed vide *Foster* v. *Jackson*, *Hob.* 52.

(*b*) *Peacock* v. *Jeffery*, 1 *Taunt.* 426. *Simpson* v. *Hanley*, *ante*, vol. i. 696.

in

1816.

TAYLOR *against* WATERS.

in the power of the Court to order satisfaction to be entered on the record; but how could the Court do that in the present case?

Per Curiam. Judgment for Plaintiff. (a)

Lawes was to have argued for the plaintiff.

(a) See *Burnaby*'s case, 1 *Str.* 653. *Tanner* v. *Hague*, 7 *Term Rep.* 420.

PATTISON *against* ROBINSON and Others.

Friday, May 17th.

Where plaintiffs sold goods to *T.*, who paid for them, and was to take them away, but defendant becoming possessed of the place in which the goods were deposited, plaintiffs' attorney, accompanied by *T.*, demanded them of defendant, telling him that they belonged to plaintiffs, and that they had sold them to *T.*; to which defendant answered that he would not deliver them *to any person whatsoever*, and afterwards plaintiffs repaid the money to *T.* and brought trover against defendant: Held that this demand and refusal were sufficient evidence of a conversion to support the action, and that a new demand by the plaintiffs, after they had repaid the money to *T.* was not necessary.

UPON a bill of exceptions tendered at the trial before *Bayley* J., at the *Durham* Summer assizes, 1814, in an action of trover for goods, and not guilty pleaded, it was stated in substance as follows. The plaintiffs below proved, that the goods in question formerly belonged to one *Watson*, in a brewhouse, which also belonged to him, and he duly assigned the goods, by deed, on the 10th and 11th *January*, 1812, to the plaintiffs; the plaintiffs afterwards sold them to one *Thwaites*, and *Thwaites* paid for them on the night the bargain was made, and was to take them away. The defendant became possessed of the brewhouse while the goods remained in it; and after the sale to *Thwaites*, while the goods remained in the brewhouse, in the defendant's possession, one *Wilkinson*, the plaintiffs' attorney in this action, accompanied by *Thwaites*, demanded them of the defendant, telling him that the goods unquestionably belonged to the plain-

tiffs,

1816.

PATTISON *against* ROBINSON.

tiffs, and that they had sold them to *Thwaites*, and requesting the defendant to deliver them up; to which the defendant answered, that he had taken the premises with the utensils, that they were in the brewhouse, that he had the key of it, and would not deliver them up to any person whomsoever. *Wilkinson* proved, that he demanded the goods by order of *Rippon*, one of the plaintiffs, and did not demand them for or in the name of *Thwaites*, or of any person in particular; and *Thwaites* proved, that *Wilkinson* made the demand for him and as his attorney, but that he told *Wilkinson* to mind that he (*Thwaites*) would have nothing to do with law; and that he let the money he paid for the goods rest in the hands of *Rippon* ten or twelve weeks, till he found that there was no possibility of his getting the goods, and then got his money back from *Rippon*. This demand was made above a month after *Thwaites* bargained for the goods, and the witness believed the defendant never used them. *Wilkinson* also proved, that before the commencement of the present suit, he, as attorney of *Thwaites*, but without his authority, and by order of *Rippon*, after the above stated demand had been made, brought an action, at the suit of *Thwaites*, against the defendant; that *Thwaites* prevented his proceeding in the same, but that it was not discontinued, only no step had been taken therein after service of the writ; and that the plaintiffs, at the instance of *Thwaites*, afterwards, and before the commencement of the present suit, repaid him the price of the goods. The defendant's counsel thereupon insisted, that by the sale of the goods to *Thwaites*, and the payment of the price by him to the plaintiffs, they ceased to be the plaintiffs' property, and became the pro-

1816.

PATTISON *against* ROBINSON.

property of *Thwaites*; and that although the demand and refusal might be evidence of a conversion, by the defendant, of the goods of *Thwaites*, yet was it not evidence of a conversion by the defendant of the plaintiffs' property; and consequently that the plaintiffs were not entitled to maintain their action. The learned Judge delivered his opinion to the Jury, that where there has been a demand and a denial of right, the same may be such as is evidence of a conversion, not merely at that time, but afterwards; that the defendant's subsequent conduct might explain that, and it might be a conversion for so long a period as he persisted in that conduct. That here the defendant was told, that *Thwaites* claimed under the plaintiffs; that he denied the right of all, and said he would not deliver the goods to any person whatsoever, and that he never afterwards offered to deliver them up; and his neglect to make such offer, coupled with his denial and the form of it, was evidence for their consideration, of a continuance of the conversion, and of the fact, that up to the time of bringing the action, the defendant continued in the same mind to keep the goods and not give them up to any person whatsoever, but to insist on his right against the plaintiffs; and that if they were satisfied, from the tenor of the denial to *Wilkinson*, and from the defendant's neglect to make any subsequent communication, either to *Thwaites*, *Wilkinson*, or the plaintiffs, that the defendant continued in the same mind, as to not delivering up the goods to any person whatsoever, and as to insisting on a right in himself thereto, down to the time when this action was commenced, they ought to hold, that such a conversion as was necessary to maintain the action was sufficiently made

1816.

PATTISON *against* ROBINSON.

made out: and under that direction, the jury found for the plaintiffs, damages 16*l*.

And the question made upon this bill of exceptions was, whether the facts stated afforded sufficient evidence of a conversion on the part of the defendant, to be left to a jury in support of this action of trover.

Walton, for the plaintiff in error, argued, that at the time of the demand and refusal of the goods, the property was vested by the contract, and payment of the price in *Thwaites* (*a*), and consequently the conversion was to *Thwaites* and not to the plaintiffs below; and that a conversion being in its nature a single act, which terminates with the doing of it, was not capable of being continued to a subsequent time, or transferred to another person, though there might be several acts of conversion at different times, and to different persons. "So trespass cannot be laid of loose chattels with a *continuando*, and if it be so laid, no evidence can be given but of the taking at one day." (*b*) And though a conversion cannot (as it is said) be purged "as if a man ride the horse of another, and afterwards return the horse to the owner, yet an action lies against him because of the conversion (*c*);" this is to be understood where the property remains unchanged; for if the owner has parted with the horse, it will be otherwise. And if the plaintiffs below could avail themselves of this conversion, every person into whose hands these goods should hereafter pass, might do the like, and the defendant would be liable to as many actions as there might be transfers of property, which would be highly

(*a*) *Bull. N. P.* 50. 6th edit. *Salk.* 113. 12 *Mod.* 344.
(*b*) *Bull. N. P.* 86. (*c*) 1 *Roll. Abr. Action sur Case* (I.), *pl.* 1.

incon-

inconvenient. The plaintiffs, therefore, should have made a new demand, and obtained a refusal to themselves before they brought this action.

Richardson, contrà, argued, that although the property passed to *Thwaites* by payment of the money, yet it was competent to him to rescind the contract, and to the plaintiffs to consent thereto, and resume the property (*a*), in like manner as the vendor may stop *in transitu*, though the property has passed to the vendee. And if the argument, that a conversion cannot, from its nature, be a continuing act, be correct, how comes it, that in felony, although the *asportavit* or conversion be in one county, yet it is a continuing felony in every other county where the felon is found with the goods? A demand and refusal are but evidence of a conversion, and as this refusal was in denial of the right of both parties, there could be no occasion for a new demand by one of them. The law does not require the performance of that which would be nugatory; and the defendant, by his conduct, discharged the plaintiffs from the necessity of making any other demand; wherefore he shall not avail himself of the want of that of which he was the cause. (*b*)

Lord ELLENBOROUGH C. J. It appears to me, that a conversion, in point of law, was made out in this case. The defendant had notice of the situation in which the parties stood with respect to their several interests; that the one had sold, or endeavoured to sell the goods, and the other to obtain possession of them. The defendant is a wrongdoer, and refuses

(*a*) *Atkins* v. *Barwick*, *Str.* 165. (*b*) *Jones* v. *Barkley*, *Dougl.* 684.

to

1816.

PATTISON *against* ROBINSON.

to attorn to the title of the sellers or purchaser; he wrongfully disappoints the effectual execution of their contract, in respect of which a price had been paid; and informs the parties that he would not deliver the goods to any person whatsoever. After such a declaration, I think it must be taken, that the defendant meant to give a refusal both to seller and purchaser, so far as they were concerned. It was a declaration, that as to them the defendant would disappoint the contract, and hold the property against all the world. It resembles, therefore, the case, where a party declares before-hand, that if a tender is made to him he will not accept it, which dispenses with the necessity of a formal tender. I do not think it necessary to enquire whether this may not be considered as a continuing conversion, because there was at the time a conversion to the several parties then interested, by a refusal to give effect to their contract. There was no objection to the title of the one party to sell, and of the other to purchase, and therefore *quoad* them, this refusal amounted to a conversion. *Thwaites* certainly paid the price for these goods, but if the contract is rendered ineffectual by the refusal of the defendant, *Thwaites* has a right to place himself in his integral situation, by rescinding the contract. This is done by consent of the parties, and the defendant becomes a wrongdoer, as it regards the party, who by the rescinding of the contract has become the proprietor. This was a conversion *ab antecedenti*, it was competent to the party to rescind the contract, and he has done it, he was not bound to purchase a lawsuit. I think that the demand and refusal at the time enured for all purposes to the one party and the other;

1816.

PATTISON *against* ROBINSON.

other; it is unnecessary to consider it as a continuing conversion.

ABBOTT J. I am also of opinion, that the plaintiffs at the trial were entitled to maintain this action. There can be no doubt that in justice, they have a right to recover the value of the goods from the defendant, who by his act, has rendered abortive the sale of them to a third person. The objection to the plaintiffs' recovery is founded upon a strict and nice proposition of law, viz. that by the sale to *Thwaites*, and payment by him of the price, the property became vested in him; whence it is argued, that the demand and refusal stated in the bill of exceptions, could have no operation as it regards the plaintiffs. It may be that the property did vest in *Thwaites* by the sale and payment of the price; but I believe it has never been decided that where there has not been an actual delivery, it is not competent to the parties to rescind the contract, and thereby revest the property in the sellers. But it is said, that this must not be done to the prejudice of a third person, which may be conceded in the present case; because it appears that the defendant was informed of the whole transaction, when the goods were demanded of him, namely, that they belonged to the plaintiffs, and that they had sold them to *Thwaites*, and the defendant was therefore requested to deliver them up; to which he answered, that they were in his possession, and he would not deliver them up to any person whatsoever. This I consider as a distinct refusal to deliver either to the one party or the other. Now it may be asked, is the defendant prejudiced, by this reverting of the property, to the plain-

1816.

PATTISON *against* ROBINSON.

plaintiffs? It is said, this subjects the defendant to two actions. Perhaps, if upon this demand and refusal, *Thwaites* had brought his action to recover the goods, it might then be argued, that as he had treated them as his own, he should not be allowed to rescind the contract; but here it appears, that *Thwaites* has not brought any action; for the action which his attorney brought, was without the authority of *Thwaites*; therefore, I cannot consider *Thwaites* as involved in the consequences of it, so as to be precluded from rescinding the contract. It seems to me, that it is not competent to the defendant, to set up in his defence the sale to *Thwaites*, in order to defeat the rights of the plaintiffs; nor can he contend, that after all the circumstances were made known to him, the plaintiffs shall not have the benefit arising from such a communication. For these reasons, I am of opinion, there ought to be judgment for the defendants in error.

BAYLEY J. I was desirous of hearing my Brother *Abbott*, before I gave any opinion in this case, because it was against my direction that this bill of exceptions was tendered. I shall only now add, that I entirely agree that there ought to be judgment for the defendants in error. The action was brought by the plaintiffs below, who were owners of the goods, and had sold them to *Thwaites*, under an expectation that no difficulty would arise to prevent the delivery, and that *Thwaites*, who paid for them, would obtain possession. The goods, however, were deposited in a place where the defendant had the control over them, and refused to part with them; consequently they were not delivered to *Thwaites*. But *Thwaites* never intended

1816.

PATTISON *against* ROBINSON.

tended to purchase a law-suit, he cautiously avoided that; he contemplated that he should receive the goods, and when he found that he could not obtain them, he rescinded the contract. An action was commenced in his name, but without his authority, and he disavowed it. It seems to me then, that it was competent to the parties to rescind the contract, and to place *Thwaites*, as he ought in justice to be placed, in the same situation as if the contract had not been made. The plaintiffs below then commence their action, and the question at the trial was, whether they could rest their case on the evidence of the refusal given to the demand made by *Wilkinson* and *Thwaites*, so as to show that the defendant was guilty of a conversion, of which they were entitled to take advantage. It has been said, that the goods were at this time the property of *Thwaites*, and they certainly were so *sub modo*, and would have become absolutely so, had not the contract been rescinded: nevertheless, if this refusal amounted to a denial, as well of *Thwaites*'s right as of the plaintiff's, and was accompanied by a withholding of the possession from both, this was evidence, as it struck me at the trial, of a conversion, as it affected both, which continued up to the time of bringing the action. I therefore conceived it to be a question to be left to the jury, whether the defendant did not continue in the same mind, as to withholding the goods after the period when the contract was rescinded.

Judgment for the Defendants in Error.

1816.

Saturday, May 18th.

The King *against* The Inhabitants of Great Yarmouth.

A hiring at weekly wages, either party to be at liberty to part at a month's notice, was held to be a yearly hiring; although the case stated that the pauper let himself by the week, it being also stated that at the time pauper let himself by the week nothing passed between him and his master as to his being hired by the week, except that he was to have weekly wages.

THE Court of Quarter Sessions, for the county of *Suffolk*, confirmed an order of two justices, for the removal of *Samuel Gowing* and *Sarah* his wife, from the parish of *Bungay*, to the parish of *Great Yarmouth* in *Norfolk*, subject to the opinion of this court upon the following case:

The pauper *S. Gowing*, previously to his marriage, and about eighteen years ago, hired himself to one *Worts*, at *Great Yarmouth*, as a journeyman baker. He let himself by the week, and was to have 5*s.* per week wages, and also meat, drink, washing, and lodging, and either party was to be at liberty to part with the other, by giving *a month's notice.* The pauper stated he let himself by the week, and was to have 5*s.* per week, but at the same time stated, that nothing passed between his master and himself as to his being hired by the week, except that he was to have 5*s.* per week wages. The pauper served under this hiring, four years and three quarters uninterruptedly, and then quitted the service upon receiving a month's notice. He received his wages sometimes at the end of a week, sometimes at the end of a fortnight, three weeks, or a month, as he wanted them. He entered *Wort's* service in the summer, and left him about *Michaelmas.*

Scarlett and *Primrose* in support of the order of Sessions, admitted the rule, that where the wages are weekly, and there is nothing but the wages from which

1816.

The KING *against* The Inhabitants of GREAT YARMOUTH.

which the duration of the service is to be collected, the hiring is a weekly hiring (a); but they relied on the distinction arising out of the stipulation for a month's notice, for that is inconsistent with a weekly hiring. (b)

Topping and *E. Alderson*, contrà, argued upon the statement of the sessions in this case, that this was a hiring by the week; for the case states, "he let himself by the week," so that there is an express finding of the fact in the first instance; and that which follows, as to what the pauper stated, is only evidence, and not fact. But this Court will only look to the facts, and will not nicely scrutinize the finding of the sessions, whether it be the proper conclusion or not, but rather hold to the fact as the sessions have found it. (c) This being so, *Rex* v. *Bradninch* (d) is in all respects similar, and is decisive of the present case. In *Rex* v. *Hampreston*, no period of hiring was mentioned, as in this case, to preclude the inference of its being for a year, and in *Rex* v. *Birdbrooke*, the hiring was expressly for the year round; so that they afford not any analogy.

Lord ELLENBOROUGH C. J. I believe the Court do not feel at all disposed to usurp the province of the Court below, as to the statement of the case; and the observations which I shall make will be founded upon

(a) 2 *Term Rep*. 453. *Rex* v. *Newton Toney*.

(b) *Rex* v. *Birdbrooke*, 4 *Term Rep*. 245. *Rex* v. *Hampreston*, 5 *Term Rep*. 205.

(c) *Rex* v. *Folkestone*, 3 *Term Rep*. 505. *Rex* v. *Hurdis*, *ibid*. 497.

(d) *Burr. S. C.* 662.

 the

1816.

The King *against* The Inhabitants of Great Yarmouth.

the facts as stated in it. I do not think any very material argument arises from its being first found by the sessions, that the pauper let himself for a week; because that is explained by the statement which follows. All the facts are to be taken together into consideration, without reference to the precise order in which they are found; and the sessions have come to this conclusion upon them, that the hiring was an indefinite hiring. The first fact stated is, that the pauper let himself by the week; but in order to discover whether that was intended as the measure of time for which the service was to endure, we must look to the context, and see how the contract was determinable. We find then, that either party was to be at liberty to determine it by giving a month's notice. Can any one say that it is a weekly hiring, when the parties were not at liberty to part without a month's notice? I cannot say so. What then is the effect of a month's notice? It does not follow from thence, that it was a monthly hiring, or for any definite number of days. Wherefore, as there is no limited period of duration to be assigned for the service, the law in such case implies, that it is for a year. This mode of considering the case, is somewhat strengthened, if we advert to that which the sessions have added, namely, that the pauper stated that nothing passed between him and his master, as to his being hired by the week, except that he was to have weekly wages. It is, therefore, in common sense and fair intendment a hiring, of which no certain portion of time can be predicated for its duration, and is consequently a general hiring, which the law says is a hiring for a year.

1816.

The KING *against* The Inhabitants of GREAT YARMOUTH.

BAYLEY J. I am of the same opinion. The Court do not interfere with facts found by the sessions, but we take it for granted, that the sessions could not mean to find as a fact, that there was a distinct weekly hiring, and upon that to submit the question to us, whether the pauper gained a settlement by service under it. It would be to impute ignorance to the sessions to suppose that they meant to put any such question; and therefore we apprehend they meant to submit, whether there was a hiring for a year. The sessions state, that the pauper let himself by the week, and if this were all, it would import that there was not any obligation either on the master or servant beyond a week; but the case does not stop here, but goes on to state, that either party was to be at liberty to part at a month's notice. Now, if there was to be a month's notice before the one could quit or the other dismiss from the service, how is this consistent with a weekly hiring? This point was discussed, and, as I thought, was settled in *Rex* v. *Hampreston*, that the requiring a month's notice is inconsistent with a weekly hiring. It has been urged, that we ought to reject the latter part of the case, because it is evidence only; but I do not agree to that, because it seems to me, that the sessions have purposely stated it, in order to ask our opinion, whether the right conclusion be, that the pauper let himself by the week. And if we look at the evidence, it puts the case out of doubt; for although the pauper stated, that he let himself by the week, yet he added that nothing passed between him and his master, as to his being hired by the week, except that he was to have weekly wages. Now if that were so, and a month's notice were required, this was not a weekly hiring;

1816.

The KING *against* The Inhabitants of GREAT YARMOUTH.

and if not a weekly hiring, then there was no definite period assigned for its duration, and it became a general hiring; and this the law has defined to be a hiring for a year. I consider this then as a hiring at weekly wages to be determined by a monthly notice, which according to *Rex* v. *Hampreston* is a hiring for a year.

ABBOTT J. This case is certainly not drawn up with the usual perspicuity of a case stated by the sessions, because it states evidence of the fact, instead of the fact itself, which ought to be found. If upon a case stating evidence only, this Court should think the conclusion which the sessions had drawn from it a wrong conclusion, they would probably deem it better to send back the case for revision; but where, as in the present case, the conclusion appears to be right, it would be useless to send it down again. Now, if we take the case upon the pauper's evidence, it seems to me, that he agreed to serve for 5*s.* a week, and that they should be at liberty to part at a month's notice; which according to *Rex* v. *Hampreston*, and the reason of the thing, amounts to a general hiring. It is plain, that the period of service was not fixed by the hiring, the contract was not confined to a week, for there was to be a month's notice; neither was it for a month, for there were weekly wages; the hiring, therefore, was indefinite, and it now is too late to deny that this is a yearly hiring. For these reasons, I think the conclusion of the sessions was right.

HOLROYD J. I am also of the same opinion, that the sessions came to the proper conclusion. This, as

 it

it appears to me, was a general hiring, determinable at any period by a month's notice, which is in law a yearly hiring. It was not a weekly hiring, because of the month's notice, nor a hiring for a month, for then it would have been determinable only at the completion of each month's service, whereas this might have been determined at the expiration of a month's notice, without regard to whether it expired at the month's end or not. I think, therefore, that the finding of the sessions was right.

1816.

The KING *against* The Inhabitants of GREAT YARMOUTH.

Order of Sessions confirmed. (*a*)

(*a*) See *Rex* v. *Dodderhill*, *ante*, vol. iii. 243. *Rex* v. *Lambeth*, *ante*, vol. iv. 315.

The KING *against* W. YONGE, D. D.

Saturday, May 18th.

Probate in the court of the Archdeacon of *Sudbury*, to whom the Bishop granted full power to prove the wills of all persons deceased within the archdeaconry, was held good, the testator having died within the said archdeaconry; although he was possessed of a term of years in lands lying within another archdeaconry in the same diocese.

JACOB BANHAM being possessed of a term of years in certain lands situate at *Ashfield* and *Thorpe*, *St. Peter*'s, in the county and within the archdeaconry of *Suffolk*, in the diocese of *Norwich*, made his will, and thereby appointed *R. Bixby* his executor; and afterwards, on the 1st *July*, 1766, died within the archdeaconry of *Sudbury*, also in the diocese of *Norwich*. The executor proved the will, in the archdeaconry court of *Sudbury*, and obtained probate there, and assigned the said term to *G. F.*, who afterwards sold and conveyed the same to one *D. Birkett*; and the said *D. Birkett*, for the perfecting his title, and in order thereto for obtaining letters of administration, with the will annexed, in the consistorial and episcopal court of the Bishop of *Norwich*, appeared before the defendant, being chancellor, vicar-general, and official principal of the said

 bishop

1816.

The King *against* Yonge.

bishop at the said court, and prayed that the commissary for the archdeaconry of *Sudbury* might be monished to transmit the original will of *Banham* to the judge of the bishop's court, and to leave it there for the purpose of having administration granted to a nominee of the said *D. Birkett.*

The defendant having refused to grant the said monition, a mandamus to grant the same was issued to him reciting all these facts, and alleging that the archdeaconry court of *Sudbury* had no jurisdiction to grant the said probate, but that the same belonged to the consistorial and episcopal court of the Bishop of *Norwich.*

To this the defendant returned, that the will was brought into the court of the Reverend *Joseph Atwell*, then commissary for the archdeaconry of *Sudbury*, and that the said court had power to grant probate; for that on the 10th of *December*, 1755, the then bishop of *Norwich*, by deed-poll, appointed the said *J. A.* to be commissary, and granted full power to prove the wills of all persons deceased within the said archdeaconry of *Sudbury*, (the last wills of noblemen, esquires, clergymen, and beneficed persons, and others, within the archdeaconry aforesaid, who should of their own accord desire to come to the bishop and vicar-general excepted,) which appointment was duly confirmed by the dean and chapter of *Norwich.* That *J. A.*, by force of the said appointment, became possessed of full power to grant probate and administration (with the exceptions in the deed), as fully to all intents and purposes as the same could or might be granted by the consistorial and episcopal court of the Bishop of *Norwich.* That *J. Banham*, after the said appointment, being resident within the archdeaconry of *Sudbury*, and

1816.

The KING against YONGE.

not being a nobleman, esquire, clergymen, or beneficed person, died within the same archdeaconry, to wit, at *Felsham*; that his executor not desiring to proceed before the bishop and his vicar-general, obtained probate of the will, in the court of the said *J. A.*; and the return alleged, that the probate was as valid in law, as if it had been granted by the vicar-general in the said consistorial and episcopal court; that the said court of the archdeaconry of *Sudbury* had possession of the original will; and denied that the defendant had authority to issue a monition, &c.

Richardson took exception to this return, that by the general rule probate is to be granted by the ordinary or his proper officer, who are armed with competent authority to enforce the jurisdiction with which they are invested, and to compel probate for the benefit of all parties interested under the will. For which purpose, the ordinary or his proper officer may, if the executor refuse to come in, issue a monition to him, which if the executor disregards, they may issue a commission to collect the goods of the deceased. From all which it is plain, that the officer entitled to grant probate must be such as has authority over the district where the property of the deceased lies, otherwise he cannot have the means of enforcing probate; and this constitutes the distinction between the powers of the ordinary and archdeacon in this respect, the one being restrained to the archdeaconry, the other being general over the whole diocese. It follows then, that as the commissary for *Sudbury* could have had no power to seize a term of years in lands, which lie not in his archdeaconry, he could not be the proper officer to grant probate in this case.

Per

1816.

The King *against* Yonge.

Per Curiam. The appointment of the bishop, as it regards the power of the commissary to prove wills, arms him with episcopal authority for that purpose. The grant of the power attracts to it all the means by which the power can be exercised. The commissary is bishop for the purpose of proving such wills as he is authorized by the grant to prove.

Return confirmed.

Scarlett and *Robinson* were to have supported the return.

Monday, May 20th.

Hentig and Another *against* Staniforth.

Where a licence was obtained and insurance effected from *Riga* to *Hull*, on goods the produce of *Russia*, on board a *Swedish* ship, but the ship sailed three days before the letter directing the licence to be obtained reached the agent, the letter having been delayed by contrary winds beyond the usual time, and the licence was obtained two days afterwards, and the insurance effected subsequently to that: Held that though the voyage was in its inception illegal, being contrary to 12 *Car.* 2. *c.* 18. *s.* 8., nevertheless the assured might recover back the premium.

THIS case was argued on a former day in this term, by the *Attorney-General*, *Gaselee*, and *F. Pollock*, for the plaintiffs; and by *Scarlett* and *Barnewall*, for the defendant. The case of *Oom* v. *Bruce* (*a*) was mainly relied on for the plaintiffs; and those of *Andree* v. *Fletcher* (*b*), *Morck* v. *Abel* (*c*), *Lubbock* v. *Potts* (*d*), *Toulmin* v. *Anderson* (*e*), *Cowie* v. *Barber* (*f*), *Vanhartals* v. *Halhed* (*g*), for the defendants.

Cur. adv. vult.

Lord Ellenborough C. J. on this day delivered the judgment of the Court. This was an action for money had and received, to recover back the premium that had been paid on a policy of insurance. The

(*a*) 12 *East*, 225. (*b*) 3 *Term Rep.* 266. (*c*) 3 *Bos. & Pull.* 35. (*d*) 7 *East*, 449. (*e*) 1 *Taunt.* 227. (*f*) *Ante*, vol. iv. 16. (*g*) 1 *East*, 487. *n.*

cause

1816.

HENTIG *against* STANIFORTH.

cause was tried before me at *Guildhall*, and the facts, as stated by the plaintiffs' counsel, and which were admitted without proof, were these: The policy was dated on the 20th of *November*, and was on goods at and from *Riga* to *Hull*. The ship, which was a *Swedish* ship, was chartered for the voyage; and by the terms of the charter-party a *British* licence for the voyage was to be procured. On the 3d of *September* a letter was written and sent from *Riga* to the agent of the assured in *England*, directing him to procure a licence and to effect insurance. The letter was delayed beyond the usual time by contrary winds, and was not received till the 5th of *October*. On the 7th of *October* a licence was obtained. The ship sailed from *Riga* on the 3d. It was objected, that this was an illegal voyage, by the stat. 12 *Car.* 2. *c.* 18. *s.* 8., the ship being *Swedish*, and the goods the produce of *Russia*, and that the plaintiff being *particeps criminis*, could not recover back the premium. A verdict was taken for the plaintiff, with liberty to the defendant to move to set it aside and enter a nonsuit. Such a motion was accordingly made, and a rule to shew cause granted, and the matter has been argued. Upon consideration, we think the plaintiff is entitled to recover back the premium, on the principle of the decision of *Oom* v. *Bruce*, 12 *East*, 225. The objection is, that the contract was illegal, the voyage insured being for the conveyance of *Russian* commodities from *Russia* to *England* in a *Swedish* ship, and so contrary to the navigation act, 12 *Car.* 2. *c.* 18. *s.* 8., and that the plaintiff being *particeps criminis* cannot recover back the money paid on the illegal consideration. But before the time of this insurance, a statute had passed, enabling his majesty to legalize such

a voyage

1816.

HENTIG against STANIFORTH.

a voyage by licence, and in fact a licence had been granted before the policy was effected, though not until four days after the ship sailed, the ship having sailed on the 3d *October*, and the licence being dated on, and expressly made to be in force from the 7th of that month. The ship having sailed before the licence was granted, it has been decided, and rightly so, that the policy was void. No risk, therefore, was ever incurred by the underwriter, and if he can retain the premium, he will retain it for nothing. But though the licence was not actually obtained until the 7th of *October*, it was always in the contemplation of the parties, that a licence should be obtained; the charter-party provides for it, and a letter directing it to be obtained was sent from *Riga*, on the 3d of *September*, which, according to the ordinary course, might be expected to have arrived in *England* in time for a licence to be procured before the 3d of *October*, the day of the ship's departure. If the licence had been obtained before the ship's departure, the voyage would have been legal. The plaintiff residing abroad had reasonable ground to suppose, that the licence would be obtained before the ship sailed: he contemplated a legal and not an illegal voyage. His agent in *England* knew that the licence was obtained, but was ignorant of the time of the ship's departure; he also contemplated a legal and not an illegal voyage. The illegality depended upon a fact, viz. the posteriority of the licence to the ship's departure, which was not known to the parties, and was contrary to the opinion and expectation that the plaintiff might reasonably entertain. In this respect, the present case is in principle the same as *Oom* v. *Bruce*; there the illegality of the voyage arose out of the commencement of hostilities on the

1816.

HENTIG *against* STANIFORTH.

the part of *Russia*, which was a fact unknown to the plaintiffs when they effected the policy. It was urged in argument, for the purpose of distinguishing the two cases, that *here* the voyage was *primâ facie* illegal, because a licence was necessary to legalise it. But there is nothing of illegality apparent on the face of the policy, and as far as the plaintiffs' knowledge of the facts, coupled with the circumstance of the expected licence, appears to have extended, he had a right to suppose that the voyage would be legal: there was no illegality apparent to him or to his agent. We think, therefore, that this distinction does not exist. But the case is plainly distinguishable from all the cases cited on the part of the defendant, wherein the return of premium was called in question. In *Toulmin* v. *Anderson*, 1 *Taunton*, 227., no question on the return of premium was ever made. In all the other cases cited the voyages were illegal; and there was not in any one of them any state of facts either actually existing or supposed to exist, that could render it legal. In the present case, a state of facts was supposed to exist, and reasonably so supposed, under which, if the expectation of the parties had been realized, the voyage would have been legal. Unfortunately for the plaintiff his expectation was disappointed, and he lost the benefit of his insurance; but he contemplated a legal voyage and a legal contract. And we think, therefore, that he is not a party to a violation of the law, and is entitled to recover back his premium, as money paid without any consideration.

Rule to be discharged.

1816.

Monday, May 20th.

Doe, on the Demise of Chattaway, against Smith and Wife.

Devise of the interest of all my land property, whether houses, bank stock, or cash, after discharging my debts, to my wife; and after her demise to my brother *W.* for life, but not to cut, fall, or destroy any thing of the estate; and after his decease into my sister *C.*'s *family*, to go in heirship for ever:" Held that the real estate passed in entirety to the eldest son and heir of *C.* in fee.

EJECTMENT. At the trial before *Bayley* J., at the *Warwickshire* assizes, there was a verdict for the plaintiff, subject to the opinion of the Court upon the following case:

John Russell being seised in fee, of the premises in question, by his will dated the 20th *June*, 1800, devised as follows. (*a*) "Item, after my demise, I bequeath to my wife the interest of all my land property whether houses, bank stock, or cash, after the discharging my lawful debts. Item, after the demise of my wife, I bequeath to my brother *William Russell* during his natural life, but not to cut, fall, or any way destroy any thing of the estate, nor mortgage one farfiting the said title; and one shilling to I likewise bequeath to his son *William*; and after the decease of my brother *William* aforesaid, I bequeath *into my sister's* Chattaway *family*, *to go in areshipe* for ever; and the interest of seven hundred pounds three per cent. consals Bank stock, I bequeath to *Lydia Grant* during her natural life, after the decease of *L. Grant*, I bequeath among my sisters *Ann Cox*, *Mary Carpenter*, and *Sarah Chattaway*, and if either the above should be decest, my wish is, that the shares should go to my sister's

(*a*) The language and spelling of this will are strictly preserved, it being a material consideration that this was the will of an illiterate testator.

"Chatta-

1816.

DOE, dem. CHATTAWAY, *against* SMITH.

"*Chattaway* family." And the testator appointed his wife and another his executors. The testator died; his wife also, and *William* his brother, who survived him, are both dead. The lessor of the plaintiff is the eldest male of the eight children of the testator's sister *Chattaway*, whose family are mentioned in the will, and the defendant's wife is one of the said children, by the same father. The testator's sister *Chattaway* is still living.

And the question was, whether under this devise, "into his sister *Chattaway's* family to go in heirship for "ever," the lessor of the plaintiff, as eldest son, was entitled to the entirety, or whether all the children of the testator's sister *Chattaway* were equally entitled.

Casberd, for the plaintiff, argued, that he was entitled to the whole in fee. He cited *Barnes* v. *Patch* (*a*), to shew that by the devise to her family the testator's sister *Chattaway* was herself excluded from any interest. And upon the principal point, he relied on *Chapman's* case (*b*), as recognized by Lord *Hobart* in *Counden* v. *Clerke* (*c*), that "if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house." So in *Crossly* v. *Clare* (*d*) the Court took the distinction between a devise to "descendants," or "relations," which comprehends several; and a devise to the stock or family, where it is confined to the head. And in *Wright* v. *Atkyns* (*e*) the Master of the Rolls saw no reason to dissent from *Chapman's* case, as recognized by Lord *Hobart*

(*a*) 8 *Ves.* 604. (*b*) *Dyer*, 333. (*c*) *Hob.* 33.
(*d*) *Ambl* 397. (*e*) 17 *Ves.* 261.

in

1816.

Doe, dem. Chattaway, *against* Smith.

in *Cownden* v. *Clerke*. From all which, it appears, that if this had been a devise to the "family," without more, it would have passed a fee to the lessor of plaintiff; *à fortiori*, where the testator has added, "to go in heirship for ever."

Adams, contrà, did not deny the authority of *Chapman's* case; nevertheless, he said, that the word "family" did not so necessarily import the head of it as to be incapable of a more general meaning, if such should be the intention of the testator; and accordingly in *Macleroth* v. *Bacon* (*a*), and *Cruwys* v. *Colman* (*b*), it actually received the larger construction now contended for. This was a mixed devise of real and personal property, and both were intended to pass in the same way. So in *Pyot* v. *Pyot* (*c*), the devise was of real and personal property to the nearest relations; and it was decreed, that it passed to the three relations who stood in the nearest degree. In like manner in *Barnes* v. *Patch*, upon a devise of the same description to *A.* and *B.'s* families, all the children were allowed to take. That the testator did not intend the land to pass to his sister *Chattaway's* heir is plain from this consideration; that thereby it might have passed to his brother *William's* son, to whom he had given a shilling. And if the construction contended for by the plaintiff should hold, it will follow, that the same words will have a different sense given to them in different parts of this will; for there can be no doubt that under the bequest of the shares of stock to his sister *Chattaway's* family, all

(*a*) 5 *Ves.* 159. (*b*) 9 *Ves.* 319. (*c*) 1 *Ves.* 335.

the

1816.

DOE, dem. CHATTAWAY, against SMITH.

the children would take. For the sake, therefore, of unity of construction, if there were nothing else, the heir shall not take the real estate.

Casberd, in reply, denied that the devise to his sister *Chattaway*'s family was a mixed one of real and personal property, it being a devise of the same, and no more than what the testator had previously given to his brother *William* for life, which was plainly no more than the realty, because he was prohibited from cutting, felling, or destroying the estate.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This case arises upon the very imperfect will of an illiterate testator. The question is, whether the premises, for which the ejectment was brought, are upon the construction of the will given to the lessor of the plaintiff as the eldest son of his mother *Sarah Chattaway*, or whether they are to be divided between him and his seven brothers and sisters. It is admitted, that in general by the devise of an estate of inheritance in land to a family, the eldest son, as being the heir and representative of the family, shall take the whole, according to the opinion of the judges in *Chapman*'s case, *Dyer*, 333., recognized by Lord C. J. *Hobart* in *Counden* v. *Clarke*, *Hob.* 33., by Sir *Thomas Clarke* in *Crossley* v. *Clare*, *Amb.* 397., and acted upon by the present Master of the Rolls in *Wright* v. *Atkins*, 17 *Vez. Jun.* 255. But it was argued, that a different rule ought to prevail in this particular case, for two reasons; first, because this is alleged to be a gift of real and personal property

 mixed

1816.

Doe, dem. Chattaway, against Smith.

mixed together; and secondly, because there is in the same will another clause bequeathing some personal property in the contingency therein mentioned to the same family; which would be devisable among all the children of the testator's sister; and it is contended, that the same word "family," used in different parts of the same will, must in every instance in which it occurs denote the same description of persons. The word family does not always and necessarily mean the eldest male. A bequest of personalty alone, to a family, will, according to the authorities cited for the defendant, be construed a gift to all such of the family as would in the case of intestacy be entitled to take under the statute of distributions; and in the case of *M'Leroth* v. *Bacon*, 5 *Vez. Jun.* 159., the husband was included in the word family, under very peculiar circumstances. The only decision in favor of the partition of a mixed fund is the case of *Pyot* v. *Pyot*, 1 *Vez.* 335., wherein Lord Chancellor *Hardwicke* held the word "relation" to be *nomen collectivum*, and distributed a mixed fund among several persons. But it is observable that there the gift was to the nearest relation of the name of *Pyot*; and as there were several of that name in equal degree, the Lord Chancellor considered that the will would have been void for uncertainty if he should hold the words to denote one person only. We are of opinion, however, that the devise now in question relates to land only. The meaning of the testator is very ill explained. By the first clause, a life-interest in the whole property, real and personal, is given to the wife. The gift into the family of his sister *Chattaway* is of a remainder after the death, not only of his wife, but also of his brother

William,

1816.

DOE, dem. CHATTAWAY, *against* SMITH.

William, and the subject of it is only what is previously given to the brother *William* for life. The precise subject of the devise to his brother *William* is not mentioned in terms, but the restriction not to cut, fall, or any ways destroy any thing of the estate, nor mortgage, on forfeiting the title, seems wholly inapplicable to personal property, and so likewise do the words "to go in heirship for ever;" and the bequest of 700*l.* three per cent. consolidated bank annuities, which occurs in a later part of the will, appears to be intended to take effect only after the death of the testator's widow, and not after the death of her and the testator's brother *William*; and if it be, then clearly the clause immediately following the gift to his wife, cannot comprize all the property previously given to the wife. For these reasons we think the real estate only passed to the testator's brother *William*, and in remainder into the family of his sister *Chattaway*. And upon this construction, the reasoning and authorities relating to mixed property, become inapplicable to the present case. And the second objection is reduced only to this, viz. that two different meanings will upon this construction be given to the word "family" in two distinct clauses in the same will. We think there is no weight in this objection. The use of the same word in different senses, when applied to different subjects, is a matter of very frequent occurrence, not only in conversation, but also in writing. It is indeed one great and common source of obscurity. But we are warranted in saying that a different meaning may be given to the same word, with reference to real and personal property in a will, by the opinion of Lord *Macclesfield* in *Forth* v. *Chapman*, 1 *P. Wms.* 663., at the

 end

1816.

Doe, dem. Chattaway, against Smith.

end of the report, with reference to different clauses, and of Lord *Hardwicke* in *Sheffield* v. *Lord Orrery*, 3 *Atk.* 288; Lord *Hardwicke* immediately adverting and recognizing the construction of Lord *Macclesfield* on this very subject in *Forth* v. *Chapman*, and in the Earl of *Stafford* v. *Buckley*, 2 *Vez.* 180., with reference even to one and the same clause. In the case of *Doe* v. *Over and Others*, 1 *Taunt.* 267., Serjeant *Heywood*, in the course of his argument, refers to a case in Chancery, in the following manner: — "3d *July* 1732. By the Master of the Rolls under a limitation to the family of *J. S.*, the real estates descend to the heir at law, the personal estate goes to the next of kin. MS. note probably of the late Mr. *Cox*, but the decree of that day, upon search, has not been found." The present Master of the Rolls notices this citation in *Wright* v. *Atkins*, 17 *Ves. Jun.* 255. If such a decision took place, it would be a direct authority in favor of the present plaintiff, even if the particular clause in question comprized personal as well as real estate. It may also be remarked, that the language of the two clauses is not precisely the same. The contingent shares of the 700*l.* stock are directed to go *to* his sister *Chattaway*'s family, but the remainder of the real estate is bequeathed *into* his sister *Chattaway*'s family, and with the additional words to go in heirship for ever, which denote the course of inheritance in land at the common law, viz. to the elder and more worthy of blood. We are of opinion, therefore, that the verdict is right, and that the postea must be delivered to the plaintiff.

The KING *against* THOMAS SMITH.

Wednesday, May 22d.

Two justices may proceed under 12 *G.* 3. *c.* 61. *s.* 18. to adjudge a forfeiture of gunpowder unlawfully conveyed to the person seizing the same; but the conviction must shew that the person to whom it is adjudged is the person who seized, its being adjudged to *T. G.*, the person who seized the same, without more, is insufficient.

SMITH was convicted before two justices of the county of *Middlesex*, for conveying at one time a larger quantity of gunpowder than allowed by law, and upon a certiorari to remove the record, the same was returned into this court; and stated, that on the 20th of *November* in the fifty-sixth year of the King, at the *Thames* police office, &c., one *John Gotty*, a *Thames* police surveyor, in his proper person, came before *J. H.* and *J. L.*, being two of his majesty's justices, &c., and then and there gave the said justices to understand and be informed, that one *T. Smith* did, on the 17th of *November*, in the said year, convey in a certain vessel by water, to wit, in a boat called the "*Thomas* and *Ann*," on the river *Thames* at *Blackwall*, in the said county of *Middlesex*, a certain quantity of gunpowder, to wit, twenty-five barrels and forty-nine half barrels, containing together and in the whole 4900 lbs. weight of gunpowder or thereabouts, all the said gunpowder not being then and there in barrels close joined and hooped, and so secured that no part of the said gunpowder could be scattered in the passage, and all the said gunpowder not being then and there covered with raw hides or tarpaulins, to wit, one of the said barrels and three of the said half barrels then and there being without a head at one of the ends thereof, and one other of the said half barrels being without a head at both the ends thereof; and the said boat not being a vessel with gunpowder on board imported from, or to be exported to any place beyond the

 sea,

1816.

The King *against* Smith.

sea, or going coastwise, against the form of the statute in such case made and provided; whereby and by force of the statute in such case made and provided, the said *T. Smith* had forfeited all the said gunpowder, and also the barrels containing the same. And thereupon the said *John Gotty* prayed the judgment of the said justices in the premises, according to the form of the statute in such case made and provided, and that the said *T. Smith* might be summoned to answer the premises, and make his defence thereto before the said justices. And the record then set forth the defendant's appearance, and that he pleaded not guilty. And the only evidence stated as to the seizure was this, "*that the said* J. Gotty *went on board the vessel in which the gunpowder was, and that he left a man in charge of her.*" Whereupon the justices adjudge that 4900 lbs. weight of gunpowder, being all the said gunpowder so conveyed as aforesaid, and the barrels, to wit, twenty-five barrels and forty-nine half barrels, in which the same was contained, are and is forfeited, and to be disposed of according to the form of the statute in such case made and provided; that is to say, to the use of the aforesaid *John Gotty*, the person who seized the same.

And now it was moved by *Lawes* to quash this conviction, for the following exceptions; first, that the justices had no jurisdiction; for by stat. 12 *G.* 3. *c.* 61. *s.* 26., "all penalties created by that act are recoverable before two justices," &c.; but the clause goes on to enact, that "one moiety of each penalty shall belong to his majesty, and the other to the informer prosecuting," &c.; so that it is plain that the penalty here

1816.

The KING *against* SMITH.

here intended is a money penalty alone. But the 18th section, which authorizes the seizure of gunpowder unlawfully conveyed, creates no penalty, but forfeits the same on conviction of the offenders; and this gives no power to two justices to proceed to such conviction. Secondly, it is not stated either in the information or evidence, that *J. Gotty* was the person who seized the gunpowder, for want of which the Court cannot know that he was the person to whose use the seizure ought to be adjudged. Its being stated in the adjudicating part, that the gunpowder is forfeited "to the use of *J. G., the person who seized the same*," will not supply the omission.

And for this exception, though it was contended by *Gurney*, that it was enough to shew by the information that what was done was unlawful, the Court quashed the conviction; because the justices have no jurisdiction to adjudge a forfeiture of the thing, unless upon a seizure; and for this purpose it should be made to appear to the Court that there was a seizure, and a person seizing. But the Court said, there was no doubt upon the first point, that but for this defect the justices would have had jurisdiction.

Conviction quashed.

Wednesday, May 22d.

The KING *against* The Inhabitants of KELSTERN.

Where pauper, a married man, agreed to serve *S.* for a year as a labourer, and was to have 20*l.* a-year, a *house and garden*, a piece of land for potatoes, the milk of a cow, and feeding of a pig, which were to run on a neighbouring field; and under this agreement the pauper served, and had the exclusive occupation of the house for himself and family, the house being about 100 yards from the house of *S.*, and being necessary for the performance of his service, and if he had not had it he would have had more wages: Held that this was not a coming to settle on a tenement to confer a settlement.

UPON an appeal against an order of two justices for the removal of *W. Astrop*, his wife and children, from *Aylesby*, to *Kelstern*, in the county of *Lincoln*, the sessions confirmed the order, subject to the opinion of this Court, upon the following case:

The pauper being settled at *Kelstern*, and being a married man, agreed with one *Skipworth*, a farmer in the parish of *Aylesby*, to serve him for a year as a confined labourer in husbandry (that is, to work for him and for no other person during such term of service.) By the agreement, the pauper was to have 20*l.* a year for wages, a house and garden, a piece of land for planting potatoes, the milk of a cow, which was to run on a field near the house, and also the privilege of feeding a pig on the same field. The cow was to be *Skipworth*'s cow, and it went on different parts of the farm, but was milked by the pauper. *Skipworth*'s house was about a hundred yards distant from the house in which the pauper lived, and a turnpike road ran between them. The pauper and his family had the house to themselves: no other person occupied any part of it: and *Skipworth* kept nothing in it. The pauper lived in the house in *Aylesby* a year and a half. If he had not had the house, he would have had more wages, and a house was necessary for the performance of his service. The annual value of the pasturage for the cow, of the grazing of the pig, of the house and garden, and of the piece of potatoe

potatoe ground, together exceeded 10*l.* Without the house, the annual value was under 10*l.*

1816.

The KING *against* The Inhabitants of KELSTERN.

Scarlett, *J. Balguy*, and *N. G. Clarke*, in support of the order of sessions contended, that the pauper did not acquire a settlement in respect of the occupation of the house, it not being an occupation *suo jure*, but only as servant to *Skipworth*, wherein they differed it from the case of *Rex* v. *Minster* (*a*), because there the the occupation was unconnected with the service.

Denman and *Phillipps*, contrà, argued, that the pauper with his family had the exclusive possession of the house under the agreement with *Skipworth*, in consideration of his service; and the rent might as well be in the performance of service, as in payment of money. (*b*) And that it was not solely for the performance of his service that he occupied it, appeared from this, that his family also resided in it. And they cited *Rex* v. *Melkridge*. (*c*)

Lord ELLENBOROUGH C. J. I own I have no doubt in this case, that the only occupation of this house was the occupation of the master and not of the servant, whom the master placed there for the mutual convenience of both parties. The master's house was about a hundred yards distant from it, and the servant had it thrown into the bargain in cumulation of wages. This may be compared to rooms allotted to a coachman over the stables of his master, or to an out-house, where being a family man it is more convenient that he should be out of the dwelling house; but that is

(*a*) *Ante*, vol. iii. 276. (*b*) See *Co. Lit.* 142. *a.*
(*c*) 1 *Term Rep.* 598.

nothing

1816.

The King *against* The Inhabitants of Kelstern.

nothing more than the occupation of the master. So here I cannot see that the occupation goes farther. In *Rex* v. *Melkridge*, the question did not turn upon, whether it was an occupation by the herdsman or the commoners who employed him, for it did not appear that the commoners ever had an occupation in any way, but the herdsman had it exclusively. At present, it seems to me to be incontestably plain, that this was nothing more than the occupation of the master, by the servant. Therefore the house cannot go to form a part of the tenement so as to make up the value of 10*l.* a year.

Bayley J. I take the distinction as laid down in *Rex* v. *Minster* to be this, that if the occupation be unconnected with the service, it will confer a settlement; but if it be necessarily connected with the service, as if it be necessary for the due performance of the service, it shall not confer a settlement. Now from this case I collect that the occupation of the house was necessary for the performance of the service; therefore it must be taken as the occupation of the master, and not of the servant.

Abbott J. I think it is clear that the pauper did not come to settle upon a tenement of 10*l.* a year. And I am glad that the Court is not compelled to decide that he did; because such a decision would tend much to deprive a very meritorious class of persons, namely, servants in husbandry, of many comforts which accrue to them from this species of agreement. A cottage may of itself be not worth 10*l.* a year, but if it is to be combined with other privileges, such as are given to the pauper by this contract, in order to bring the value to that amount, and thereby confer a settle-

1816.

The KING *against* The Inhabitants of KELSTERN.

a settlement, I am afraid that farmers will henceforth be unwilling to grant these additional advantages to servants in husbandry, lest they should bring so many additional burthens upon the parish. I am very glad, therefore, to find that the Court is not under the necessity of holding this to be a settlement; for no probable addition of wages would afford an adequate compensation in point of comfort for the loss of these advantages.

Per Curiam. Order confirmed.

The KING *against* The Earl of POMFRET and Others.

Friday, May 24th.

Where a rate was imposed upon *P.*, owner of the lead ore in certain lead mines, in respect of the duty-lead reserved in a lease of said mines, being one-fifth share of the lead to be smelted from the ore raised from said mines; Held that this reservation was in the nature of a rent, and therefore not rateable.

THIS case was very elaborately argued on a former day in this term by *Richardson* and *J. Williams* in support of the order of sessions, and by *Scarlett, Tindal,* and *Gilbee,* contrà. The Court took time to consider, and in delivering judgment, stated the facts of the case upon which the question arose, and referred to and commented upon the principal authorities which were relied on in argument.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This came before the Court on a motion to quash an order of sessions made at the hearing of an appeal, preferred by Lord *Pomfret* and others against a poor-rate for the township of *De Reeth.* The sessions confirmed the rate, subject to the opinion of this Court as to the question, whether the appellants were liable to be rated, upon a case, stating, that the appellants were

1816.

The KING *against* The Earl of POMFRET and Others.

were the owners of the lead ore in certain lead mines within the township; not owners of the soil of the wastes, in which the mines are situate, but merely entitled to the lead, copper, and iron contained in the veins below the soil. That by an indenture of lease bearing date the 31st of *July*, 1811, the appellants leased to Messrs. *Alderson* all their mines of lead and lead ore, with certain smelting mills and other premises therein described, and with proper powers for working the mines for a term of twenty-one years, yielding and paying to the appellants a certain pecuniary rent therein mentioned, and also yielding and paying, rendering, and delivering to the appellants, their heirs and assigns, from time to time, during the said term thereby granted, at or in the smelting mill or place situate within the manor of *Healaugh Old Land*, and *Healaugh New Land*, where the same should have been smelted, one full fifth part dole or share of all the best ore hearth lead, and one full fifth part dole or share of all the slag, or slag hearth lead, that should be *smelted* from the ore to be from time to time dug, wrought, and raised in, from, and out of the said mines and premises, or any of them, or any part thereof; the same to be delivered to the said appellants, their heirs or assigns, free and clear of and from all and all manner of dues, duties, costs, charges, and expences, and of and from the poor rates, and all other parliamentary and parochial taxes, rates, assessments, or impositions whatsoever, which then were taxed, charged, rated, assessed, or imposed, or which should at any times or time, during the term thereby granted, be taxed, charged, rated, assessed, or imposed upon, or for, or in respect of the said lead or lead ore, so

to

1816.

The KING *against* The Earl of POMFRET and Others.

to be dug, wrought, smelted, rendered, and delivered as aforesaid, or upon, or for, or in respect of the said mines and premises, or any of them, or any part thereof. The lease contained a covenant on the part of the lessees to deliver the fifth dole or share *as often as the quantity smelted should amount to four hundred pieces*, or at the end of every four weeks, at the option of the lessors. The rate was imposed upon the appellants in respect of the duty-lead reserved by the above lease. This case was argued before us with great ingenuity and learning, and all the authorities that bear upon the point were cited in the course of the argument. The counsel in support of the order of sessions relied on the cases of *Rowls* v. *Gells*, *Cowp.* 451., *The King* v. *St. Agnes*, 3 *T. R.* 480., and *The King* v. *The Baptist Mill Company*, 1 *Maule & Selwyn*, 612., and contended that this case was not substantially different from that of *Rowls* v. *Gells*, which had been recognised and followed in the two other cases; and that we ought not to depart from the principle there established, upon nice and subtle distinctions. We are of opinion, however, that the present case is substantially different from all of them, and that a decision against the present rate will not break in upon the principle, or overturn the authority of any one of them. In all those cases, the rights of the parties rated, who were the owners or lessees of the mines, and of the adventurers or miners, by whom the mines were worked, depended upon the particular custom of the place; and by that custom the parties rated were entitled to and received a certain portion of the mine, or mineral, in its primitive mineral state. And the Court, with perhaps some degree of refinement, considered the parties

1816.

The KING *against* The Earl of POMFRET and Others.

parties entitled to, and receiving such portion of the mineral, as being occupiers of a *portion of the mines*, that is, occupiers of *land* within the terms of the statute of *Eliz.*; and in the case of the *Baptist Mill Company*, made it part of the foundation of their judgment, that the adventurers *did not stand in the relation of tenants* to the owner of the mine, but in that of mere workmen. It is true, that in *Rowls* v. *Gells*, the mineral underwent some sort of process before it was delivered to the plaintiff; for the case states that the duty of lot was the *thirteenth* dish or measure of lead ore, got, *dressed, and made merchantable*, which we understand to mean made merchantable by scouring or dressing; a process thereby separating the ore from the other matters dug up with it from the mine, but not altering in any degree its original and native quality or character. The plaintiff in that case was also rated for *cope*, which is explained to be a small pecuniary payment; but no notice was taken of that circumstance in the argument or judgment; nor could it have been effectually taken; because, if the plaintiff was rateable for the *lot*, he would of course have some rateable property within the parish, and consequently his action of trespass could not be maintainable. In the case of *The King* v. *St. Agnes*, the party was entitled to toll and farm tin; which are stated to be certain portions of the tin gotten. In the case of *The Baptist Mill Company*, the party was entitled to a definite portion of the calamine stone found or gotten within his district. In the present case, the rights of the parties rated, who are the appellants, and those of the persons by whom the mines are worked, depend upon the terms of a written contract; a lease, by the

terms

1816.

The KING *against* The Earl of POMFRET and Others.

terms whereof the appellants have demised to others the whole of their mines and veins of lead and lead ore; and therefore they cannot be said to be the occupiers of any part, unless the render or reservation of one-fifth part of the lead to be smelted from the ore raised from the mines can operate as an exception of a portion of the mines, or of the ore raised from them. A reservation of a part of the thing demised cannot properly operate as a render, and it may be admitted that it operates as an exception. (*a*) But this is not a reservation of any part of the thing demised, it is not a reservation of any part of the ore, or of the mineral, in its natural and primitive state; but of something of a quality, name, and character, entirely different; of a metal, produced from that mineral by the laborious and expensive process of smelting, in which the native mineral is mixed with another matter, viz. with coal, or charcoal; and by the effect of fire upon both, a metal is obtained, which is to be considered, for this purpose at least, as entirely different from either of the two, and rather as a manufacture of art and labour resulting from the use and application of these materials, than the orginal earth itself. This lease puts the parties unequivocally in the character of landlords and tenants. The reasons upon which the Court relied in *The King* v. *The Baptist Mill Company* do not apply to this case; but it is brought substantially within the principle of the case of *The King* v. *The Bishop of Rochester*, 12 *East*, 353. For these reasons, we are of opinion that the appellants were not liable to be rated for the lead rendered to them under the lease, and consequently that the order of sessions must be quashed,

(*a*) See *Co. Lit.* 47. *a.* 142. *a.*

and

1816.

The KING *against* The Earl of POMFRET and Others.

and the rate amended by striking out this part of it. There was another case against the same parties in respect of duty-lead, payable to them under the same circumstances, in the township of *Millbecks*, upon which the same judgment must be given.

Friday, May 24th.

LETSOM *against* BICKLEY and Others.

Testatum capias directed to the coroner, where one of the two sheriffs of *Bristol* was party to the suit, held irregular; for it ought to have gone to the other.

A TESTATUM capias was directed to the coroner, one of the defendants being one of the two sheriffs of *Bristol*. And a rule nisi was obtained to set the proceedings aside, on the ground that the writ ought to have gone to the other sheriff.

Warren, who shewed cause, argued, that as where the sheriff is a party to the cause the writ is awarded to the coroner, so by parity of reason, it shall be in this case; for although there are two sheriffs, yet the office is entire, and in law they make but one sheriff, and therefore the writ shall not go to the other. Thus where the king had granted to two for their lives, and for the life of the survivor of them, the sheriffwick of *Cheshire*, and one was attainted, it was the opinion of all the justices that the whole office was forfeited, because the patent and the office were entire and could not be severed. (*a*) So if a writ issue to the sheriffs of *London*, and one of them die, the other cannot execute the writ, because his power is suspended until he has a companion chosen to him. (*b*) And in *Lambe* v. *Wiseman* (*c*), the Court was of opinion, that

(*a*) *Plowd.* 382. (*b*) 11 *Rep.* 4. *b. Curle's* case. (*c*) *Hob.* 70.

if

1816.

LETSOM *against* BICKLEY.

if one sheriff of *London* make his return without his fellow, this would not be holpen, as being no return at all. And since the return must be made *conjunctim* and not *divisim*, whether one of them be disabled from making a return by interest or by death is the same thing; and therefore it would have been useless in this case to have directed the writ to the other. Accordingly, it appears in *Lord North* v. *Elliot* (*a*), that it being suggested upon the roll, that a brother of the defendant was one of the sheriffs of *London*, the Court said, that the coroner must return the jury. And in *Wyke*'s case (*b*), a return that one of the sheriffs was party to the suit, and therefore could not summon himself, was adjudged a good return.

Park, contrà, relied on the following authorities and precedents, to shew that the writ ought to have been directed to the other sheriff, viz. *Rex* v. *Warrington* (*c*), *Rich* v. *Player* (*d*), *Lil. Entr.* 483. *Brown. Brev. Jud.* 330. *Staund. P. C.* 53.

Per Curiam. The precedents seem sufficient to establish the practice, that where there are two sheriffs, and one of them is interested, the process ought to go to the other.

Rule absolute. (*e*)

(*a*) *Skin.* 102. (*b*) *Dyer*, 266. *b.* S. C. *Anders.* 10.
(*c*) *Salk.* 152. S. C. 4 *Mod.* 65. (*d*) 2 *Show.* 262. 286.
(*e*) See *Tidd's Prac.* 6th edit. 771. and *Prac. Forms*, 4th edit. *chap.* 29. *sect.* 24.

1816.

DOE, on the Demise of R. BEADON, *against* PYKE.

Although a surrender of a life-estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet may it have continuance to uphold a prior interest derived under it: therefore where *J. B. C.* having a lease for three lives of a manor, where, by the custom, the copyholds were demiseable by copy, made a lease for years by indenture of a copyhold tenement to defendant's father, and afterwards the estate of *J. B. C.* was surrendered to the lord of the fee, who made a lease of the manor to the lessor of the plaintiff: Held that inasmuch as the lease to defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff should not avoid the same during the continuance of one of the three lives in the lease to *J. B. C.*, notwithstanding the surrender of that estate.

EJECTMENT. At the trial before *Dampier* J. at the last Summer assizes for *Somersetshire*, there was a verdict for the plaintiff, subject to the opinion of the Court, upon the following case:

The Bishop of *Bath* and *Wells* being seised in right of his see of the manor of *Wiveliscombe*, demised the same by lease, of the 28th *March*, 1739, to the Earl of *Coventry*, his heirs and assigns, for the lives of the Earl, and of his two sons, *John Bulkeley* and *George William Coventry*, at the yearly rent of 80*l*. The said Earl, on the 28th *August*, 1749, devised the said manor to *J. B. Coventry* for life; remainder to the sons of *J. B. C.*, remainder to *G. W. Coventry*, &c., and with power to *J. B. Coventry* to demise and grant by lease *and copy of court-roll, according to the custom of the said manor*, all and every the messuages, lands, and tenements, parcels of the said manor, which were then granted by lease or copy of court-roll, for life or lives, or for years determinable on life or lives, in such manner and for such estates and terms of years as the same had been usually granted, reserving thereon the ancient and accustomed rents, heriots, and services. And the testator directed, that *J. B. Coventry* should, as soon as conveniently might be, add a new life, and obtain a new lease, which lease should be for the use of the tes-

tator's

1816.

DOE, dem. BEADON, *against* PYKE.

tator's said sons, in manner aforesaid. On the 13th *March*, 1751, the said Earl died, and on the 21st *November* following, *J. B. Coventry* obtained a new lease, adding the life of His Majesty to the two subsisting lives. In 1765, *J. B. Coventry* demised the premises in question, which are parcel of the manor of *Wiveliscombe*, and which, down to that time, had always been immemorially granted by copy of court-roll, for three lives, according to the custom, to one *J. B.* by lease, for 99 years, determinable on three lives, the last of which life dropped in 1797. On the 24th *May*, 1798, the said *J. B. Coventry* demised the said premises, described as having lately fallen into his hands, as lord of the manor, by the death of the last life in the former lease, to *John Pyke*, the defendant's father, for 99 years, determinable on the lives of the defendant and two others, at the yearly rent of 1*l.* 11*s.* 5½*d.*; and also paying a heriot upon the deaths of the lives, and also paying and performing all other the rents, services, &c. heretofore accustomed, &c. The rent, heriots, and services reserved by this lease were those which had been payable and paid when the premises were granted by copy of court-roll. In *January*, 1801, *J. B. Coventry* died without issue, and intestate, leaving his brother, *George William*, Earl of *Coventry*, his heir; who, on the 21st *May*, 1802, devised the said manor, &c., to trustees, upon trust for his son, *John Coventry*, for life, remainder to his (*J. Coventry's*) first and other sons, successively in tail male. The last-mentioned earl died in 1809; and in *June*, 1813, the said J. *Coventry*, together with his eldest son, conveyed all the interest of all persons claiming under the said will, by divers conveyances, and surrender to the Bishop of

 Bath

1816.

Doe, dem. Beadon against Pyke.

Bath and *Wells*, to hold to him and his successors, to the intent that the same might merge in the freehold and inheritance, and that the Bishop might be enabled to lease the manor to the lessor of the plaintiff; and afterwards the Bishop made a new lease of the manor to the lessor of the plaintiff. The manor of *Wiveliscombe* consists of above 200 tenements, of which about 90 are leasehold, and the rest copyhold. It has been usual for the lessee of the manor to grant the leasehold tenements, by leases for 99 years, determinable upon three lives, and the copyhold, by copy of court-roll, for three lives, according to the custom of the manor. *J. Pyke*, the father of the defendant, died in 1805, having made the defendant his executor and residuary legatee; and the defendant proved the will, and entered into possession of the tenement in question. *J. B. Coventry* received the rent of 1*l.* 11*s.* 5½*d.* (reserved by the lease of 1798) from *J. Pyke*, the elder, during his life; and *J. Coventry* also received the same from the defendant, up to *Lady-day*, 1813. The lessor of the plaintiff never received any rent from the defendant. The defendant has not had any notice to quit.

And the questions made by *Horner* for the plaintiff, were, first, that the lease of 1798, by *J. B. Coventry* to the defendant's father, was void, being contrary to the custom of the manor, which was, to grant by copy and not by lease, and also contrary to the power given by the will of the first earl. Secondly, that no notice to quit, or demand of possession was necessary, to entitle the plaintiff to maintain this ejectment. As to which, he said, that where any thing has been done to recognize a tenancy, as if the party has

 received

received rent, or if possession has been given under an agreement for a purchase (*a*), there a demand is necessary. But in this case, the lessor of the plaintiff has not received any rent, or in any manner, since the commencement of his interest, recognized the defendant as tenant; wherefore the defendant may well be considered by him as a trespasser. With respect to the first and main point, he said, that whatever operation the lease of 1798 might have had, as against *J. B. Coventry*, and those claiming under him, it was extinguished by the surrender to the bishop, the lord of the fee, in 1813. If, indeed, the lease had been made by the absolute lord of the fee, it would have destroyed the copyhold; but it is otherwise, if a man, having only a particular interest in a manor, makes a *lease* at common law of a copyhold tenement within the manor; for there, though this may break the custom, as it regards his particular interest, yet it does not do so with respect to the reversioner. Thus, if a bishop, or tenant in tail, for life, or years, *lease* a copyhold, yet this shall not prevent the successor or reversioner from granting the same by copy. (*b*) Again, "If lessee for years of a copyhold manor *lease* a "copyhold by indenture for years yet this shall not "destroy the copyhold with respect to the reversioner, "because he had not the absolute estate in the "seignory; so also of lessee for life" (*c*); for which also see *Conesby* v. *Rusky*. (*d*) And as to the argument, that the lease of 1798 was good, as against those claiming under the lease of 1751, the answer to it is, that the plaintiff does not claim under that lease, but

(*a*) *Right* v. *Beard*, 13 *East*, 210.
(*b*) 2 *Roll. Abr.* 197.
(*c*) 2 *Roll. Abr.* 271. tit. *Prescription*.
(*d*) *Cro. El.* 459.

1816.

DOE, dem. BEADON, *against* PYKE.

under a surrender, which merged all the previous estates; for such was the object and effect of the surrender to the bishop; and thereby all privity of estate, subsisting between him and the former lessee, was gone. The lease of 1798 might, perhaps, have enured, as against *J. B. Coventry*, and those claiming under him, by way of estoppel; but estoppel cannot operate except between privies; consequently, so soon as the privity was gone, it ceased to work an estoppel. The same distinction is noticed by Lord *Coke*, between the effect of a surrender, as it regards those who are parties or privies, and those who are strangers. (*a*) Upon the same principle, it is laid down, that "If lessee for life make a lease for years, and "after enter into the land, and make waste, and the "lessor recover in an action of waste, he shall avoid "the lease made before the waste done." (*b*)

Gifford, contrà, argued, that the lease of 1798, to the defendant's father, was a valid subsisting lease. Although the lease was not made according to the custom, yet it cannot be denied that it was good against *J. B. Coventry*, the lessor, either to pass an interest, or by way of estoppel; and it is equally good against all such as claim under *J. B. Coventry*, so long as his interest continues, because they are in law privies. And therefore the authorities cited *contrà*, to shew that the reversioner, who is a stranger, shall not be bound, do not apply. It is submitted, that the lease was good to pass a present interest, and wherever that is so, it shall not enure by way of estoppel. (*c*)

(*a*) *Co. Litt.* 338. *b.* (*b*) *Co. Litt.* 233. *b* (*c*) *Co. Litt.* 45. *a.*

Thus

1816.

Doe, dem. Beadon, *against* Pyke.

Thus if "*A.* lessee for the life of *B.*, makes a lease for "years by deed indented, and after purchases the "reversion in fee, *B.* dieth, *A.* shall avoid his own "lease, for he may confess and avoid the lease which "took effect in point of interest, and determined "by the death of *B.* But if *A.* had nothing in the "land, and made a lease for years, by deed indented, "and after purchased the land, the lessor is as well "concluded as the lessee, to say that the lessor had "nothing in the land." (*a*) Then that the interest which passed to *J. B. Coventry*, by the lease of 1751, still subsists during the life of His Majesty, notwithstanding the surrender, is plain from considering, that the surrender was only to some purposes a merger of the surrenderor's interest, but not as it regards the derivative estate for years to the defendant's father. As it is laid down (*b*), "The fruit and effect of a surrender is, that "it doth pass the estate of the surrendror to the surren-"dree, and that hereupon the estate of the surrendror is "drowned and extinct in the surrendree, and yet not so, "but that to some purposes it shall be said to have con-"tinuance still." Again, "If lessee for life make a "lease for years, rendering rent, and the lessee for life "surrender his estate, in this case, albeit the primitive "estate for life be yielded up, yet the derivative estate "for years shall continue notwithstanding." The reason of which is this, that a surrender cannot affect a prior estate, which was well granted; and so here the surrenderee takes during the life of his majesty, subject to the subsisting lease; of which the case of the rent-charge put by Lord *Coke* (*c*) is decisive. See also

(*a*) *Co. Litt.* 47. *b.* (*b*) *Shep. Touch.* 300. (*c*) *Co. Litt.* 338. *b.*

1816.

Doe, dem. Beadon, *against* Pyke

Davenport's case. (a) Granting that the lease only enured by way of estoppel, yet is it good, so long as there is a privity. Secondly, as to the want of notice, or demand of possession; it has been adjudged, that one who enters into possession under a void lease, and pays rent, is not a disseisor, but a tenant at will (b); *à fortiori*, this defendant who has entered, and paid rent to those under whom the plaintiff claims, shall be entitled to notice, or a demand of possession.

Horner, in reply, urged, that the lease of 1798 was a wrongful lease, inasmuch as the law will never permit a copyholder to break in upon the custom, and as much as in him lies to destroy the copyhold; and this distinguishes it from the case of the rent-charge put by Lord *Coke*; for the grant of that was a rightful act.

Cur. adv. vult.

Lord Ellenborough C. J., on this day, delivered the judgment of the Court. After stating the facts of the case, His Lordship proceeded. Upon these facts, two questions were made, the one, whether the lease of 1798 were still in force, and if not, then whether the receipt of rent by *J. B. Coventry* and *J. Coventry* did not entitle the defendant to require that a demand of possession should be made before he could be treated as a wrong-doer, and subjected to an ejectment. The first objection, to the subsisting validity of the lease of 1798, was, that the conveyance to the bishop in 1813

(a) 8 *Rep.* 145. *b.*
(b) *Doe*, dem. *Warren*, v. *Fearnside*, 1 *Wils.* 176. See also *Right*, dem. *Lewis*, v. *Beard*, 13 *East*, 210.

had

1816.

DOE, dem. BEADON, *against* PYKE.

had annihilated and extinguished the estate granted by the lease of 1751 to *J. B. Coventry*, and all interests derived therefrom; or if it had not annihilated and extinguished all derivative interests, that it had annihilated and extinguished such an interest as that which this lease conveyed, because this lease broke in, *pro tempore*, upon the copyhold tenure, and was therefore, with reference to the owner of the fee, a wrongful lease. Another objection to the validity of this lease was, that it was not made pursuant to the power contained in the will of *August*, 1749. In answer, however, to this latter objection, it is sufficient to observe, that the estate to which that power was annexed, and upon which alone it could operate at law, if it did not cease in 1751, when *J. B. Coventry* surrendered the subsisting lease, and took a new one, at least ceased in 1809, when the last of the lives in the lease of 1739 dropped; and however vulnerable this lease might have been, had it been impeached whilst that life remained, it could not be impeached after that period. The lease of 1751 gave *J. B. Coventry* a new and independent interest for the life of the King, acquired by his own purchase, and over that interest he had, at law, a perfect and absolute control. Upon this objection, therefore, the lessor of the plaintiff cannot possibly succeed. The other objection depends upon the effect of the conveyance to the Bishop; first, as far as it respects generally any prior subordinate interest, derived under the lease of 1751; and secondly, as far as it respects such an interest as the particular lease to the defendant's father conferred. The conveyance to the Bishop, as between him and the conveying parties, operated as a surrender of the lease of 1751; and

1816.

Doe, dem. Beadon, *against* Pyke.

and it was urged, that such a surrender would annihilate all interests derived under that lease. No authority, however, which goes the length of that position, was adduced; and we consider it as clear law, that though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons, who at the time of the surrender had rights, which such extinguishment would destroy, and that as to them, the surrender operates only as a grant, subject to their right, and the interest surrendered still has, for the preservation of their right, continuance. This is established, by the plain and unequivocal language of *Co. Litt.* 338. *b.*, and other authorities, and the law would work great injustice were it otherwise. Lord *Coke*, after noticing, that as between the parties to a surrender the estate is absolutely drowned, says, "But having regard to strangers who were not parties or privies thereunto, (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender,) the estate surrendered hath, in consideration of law, a continuance;" and amongst other instances, he puts this: "If tenant for life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he (that is the surrenderee) cometh in under the charge." So that though the life-estate out of which the rent is granted is as between surrenderor and surrenderee, extinct and gone, yet as between the surrenderee and the grantee of the rent-charge, it has continuance so as to support the rent-charge till the original tenant for life dies. *Davenport's* case, 8 *Co.* 144. *b.*, supplies another instance still nearer the present case. Tenant for fifteen years

1816.

Doe, dem. Beadon, against Pyke.

years of a rectory, to which the advowson of a vicarage was appendant, granted to the plaintiff the next presentation to the vicarage, if it should become vacant during the term of years which the grantor then had in the rectory. The grantor afterwards surrendered his term to the reversioner, after which the vicarage became void; and in *quare impedit* the question was, whether the surrender, which as between the parties had put an end to the term of years, had extinguished the plaintiff's right, and it was resolved that it had not; because the term for the benefit of the grantee has to some respect continuance, although *in rei veritate* it is determined. There are other authorities to the same effect, and none the other way; and we are therefore of opinion, that the lease of 1798 is not invalidated by the surrender to the Bishop, unless this lease, from its breaking in upon the copyhold tenure during its continuance, is to stand upon a different footing from other leases. But upon what ground is such an exception to be made? It was said that this was a wrongful lease, but no authority was cited to prove it wrongful; and though many instances are put in the books of such leases, there is not even a dictum that they are wrongful. They suspend the copyhold tenure, indeed, during their continuance, but the copyhold tenure would be equally suspended, if the lord, *pro tempore*, were to keep the copyhold in his own hand, during the continuance of his estate; and if the owner of the manor wished to protect the suspension of the copyhold tenure by such means, lest it should injure the inheritance of the manor, he should have guarded against it, before he granted a particular interest, as an estate for life, in the manor, by imposing adequate restric-

1816.

Doe, dem. Beadon, against Pyke.

restrictions upon the grantee. Upon the whole, therefore, we are of opinion, upon the first question in this case, that the lease of 1798 is still a valid lease at law, and, consequently, that without entering upon the second question, which it becomes unnecessary to determine, there must be

Judgment for the Defendant.

Monday, May 27th.

Moor *against* Adam.

Compensation for loss of time disallowed to two merchants coming from abroad as witnesses.

IN an action of assault and battery committed at *Alicant* in *Spain*, *per quod* plaintiff was unable any longer to carry on his trade there, and was obliged to remove, &c. the plaintiff obtained a verdict, and upon the taxation of costs, claimed to be allowed the sum of 1225*l.*, disbursed by him in payment to three witnesses who were examined at the trial, and came from *Alicant* for the express purpose. Two of the witnesses were merchants at *Alicant*, and the third was their clerk, and the Master allowed the sum of 603*l.* 8*s.* for the expenses of their journey and voyage going and coming, and during their stay here, but refused to make any allowance in respect of the payment made to them *for their loss of time.*

And upon a former day in this term a rule *nisi* was obtained upon an affidavit of the plaintiff disclosing the above facts, and stating that the two merchant witnesses were obliged, during their absence from *Alicant*, to suspend all dealings, and represented that they had sustained considerable loss in consequence of their attendance, and that the compensation paid to the other witness was for his salary. There was an affidavit also

stating

1816.

MOOR *against* ADAM.

stating two instances before the Master in 1814, in one of which, (*Mellish* v. *Andrews*,) the Master at first refused to allow for loss of time of a witness coming from abroad, but upon its being referred to him to review his taxation, had ultimately allowed it; and in the other he had allowed the sum of 130*l.* on a similar account. And it was argued, from these instances, and from the case of *Schimmel* v. *Lousada* (*a*), that the practice warranted an allowance for loss of time.

In answer to the above affidavits, it was sworn that none of the said three witnesses gave any evidence whatever relative to the assault; that one of them was absent from *Alicant* at the time when it was committed, and his evidence related only to the value of the plaintiff's business, and to his being unable to carry it on after the assault; another was out of the room where the assault was made, and only heard blows given; and the third spoke only to the plaintiff's having been threatened by the defendant, in the event of his making any publication in the newspaper concerning the defendant.

The Attorney General and *Marryat*, who now showed cause, compared this to an allowance for contingent damages, which the Court had refused to make, saying it would be a dangerous precedent (*b*); and they denied that the case of *Schimmel* v. *Lousada* laid down any rule respecting compensation to witnesses for loss of time, for the Court was wholly silent upon that head; and the practice of making allowance for loss of time seems hitherto to have been confined to professional men.

(*a*) 4 *Taunt.* 695. (*b*) *Thelluson* v. *Staples*, 2 *Dougl.* 438.

Top-

1816.

MOOR *against* ADAM.

Topping and *Taddy*, contrà, urged, that inasmuch as the Master had allowed travelling expenses, it must be taken that these were necessary witnesses; and *Schimmel* v. *Lousada* is surely an authority for allowing compensation for loss of time; because the disallowance of it was one of the grounds upon which it was prayed, that the prothonotary might review his taxation, and the Court referred it back to him generally. As there is no way of compelling the attendance of witnesses who are abroad, if it is to be understood, as a general rule, that such a witness shall not be allowed any compensation for loss of time, it will cast an intolerable burden upon plaintiffs, because the expense of obtaining a witness may oftentimes exceed the value of the stake.

Lord ELLENBOROUGH C. J. I do not think that the Court is called upon to lay down any rule peremptorily, that in no case whatever, where a witness comes from abroad, shall there be an allowance made to him for loss of time; but as far as I am able to collect, from the books and precedents which have been produced, this does not appear to me, upon the affidavits, to be a case in which such an allowance ought to be made. Looking to what has been the practice in former cases, and to the case in *Dougl.*, one cannot help perceiving, that without laying down any general rule, there has been an inclination manifested to exclude allowances of this nature to witnesses like the present. And upon this occasion, considering the sort of evidence which these witnesses gave, it might not, perhaps, be ultimately beneficial to the party to have the matter reviewed by the Master, because I am not sure

 that

1816.

MOOR *against* ADAM.

that the Master might not think it proper to strike out one or two of the witnesses altogether. That, however, is not the question here; but whether the Master, in disallowing compensation for loss of time, has not acted conformably to the practice. I think he has. Some light is thrown upon this point by the statute of (*a*) *Eliz.* which provides, that such reasonable sums as, having regard to distance of place, are necessary to be allowed, shall be tendered to witnesses when they are served with process.

HOLROYD J. mentioned a case from memory, which he had received from *Chambre* J., then Baron of the Exchequer, where the Court delivered their opinion seriatim, against the allowance of compensation for loss of time to a medical person, who came as a witness from *Edinburgh*.

Per Curiam, Rule discharged. (*b*)

(*a*) 5 *Eliz.* c. 9. s 12.

(*b*) Lord *Ellenborough* C. J., during the argument, referred to a note in the Master's Book, "*Trin.* 48 G. 3., *Lowry* v. *Doubleday*. The Mas- " ter, on taxation, having refused to allow a guinea a day, paid to " each of two merchants, who came as witnesses from *Newcastle*, it was moved by *Dampier* to refer it back to the Master for his review; but a rule nisi was refused." And His Lordship added, that he believed the practice had been to make allowance to medical men and attornies, but not to others.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

1816.

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-sixth Year of the Reign of GEORGE III.

MEMORANDUM.

At the commencement of this Term, *John Hullock*, Esquire, was called Serjt., and gave for his motto, "*Auspicium melioris ævi.*"

DOE, on the Demise of PITCHER, *against* ANDERSON and Another.

Friday, June 14th.

A creditor, being ignorant that an act of bankruptcy had been committed by his debtor, executed a composition deed for the amount of his debt, and received a dividend under it: Held, that he might, notwithstanding, become a petitioning creditor, in respect of the original debt.

AT the trial of this ejectment, before Lord *Ellenborough* C. J., at the *Middlesex* sittings, the plaintiff claimed by assignment from the sheriff of a term of years, seized under an execution against one *Struber*, at the suit of the lessor of plaintiff. The defence was, the

1816.

Doe *against* Anderson.

bankruptcy of *Struber*, on the 17th of *October*, 1813, before the execution, and that the defendants were his assignees; and, in order to establish the petitioning creditor's debt, the defendants proved two promissory notes, made by the bankrupt, to one *Burgess*, (the petitioning creditor,) dated the 18th of *September*, 1813, one for 100*l.*, the other for 30*l.* The plaintiff, in reply, produced a deed of assignment, of the 15th *November*, 1813, executed by *Burgess* and the defendants, and several other creditors, whereby, in consideration of the assignment, and of the covenant of *Struber*, the said parties released *Struber* from all actions and demands. Under this deed, *Burgess* received 2*s.* 6*d.* in the pound, on the amount of his debt, having subscribed himself as a creditor for 113*l.* 15*s.*; but it appeared, that at the time of his becoming a party to this deed, he had not any knowledge of the act of bankruptcy. It was contended, that as *Burgess* was a party to this deed, and had received a payment under it, he ought not to be permitted afterwards to abandon it, and become the petitioning creditor; and *Tappenden* v. *Burgess* (*a*) was cited. It was ruled, however, by Lord *Ellenborough* C. J., that as the deed was void by reason of the act of bankruptcy, *Burgess* was not estopped from proceeding; that the estoppel was confined to those cases where the party who had executed the deed set up that deed as an act of bankruptcy; and that it was competent to *Burgess* to become the petitioning creditor; and, thereupon, the plaintiff was nonsuited.

Peake now moved to set aside the nonsuit, on the ground taken at the trial. He admitted, that the deed

(*a*) 4 *East*, 230.

would

1816.

DOE against ANDERSON.

would be inoperative as to strangers, but it was otherwise as to *Burgess*, who was a party thereto; and he referred to *Bamford* v. *Baron*. (a)

Lord *Ellenborough* C. J. The creditor takes a bad security of which he cannot avail himself, and afterwards resorts to a remedy which cannot be impeached. Why should he go on receiving under a bad title, when he could obtain payment under a valid one? It was open to any person to disturb or defeat the arrangement, as it stood upon the deed of composition. This is quite different from the authority cited, where the creditors, who had signed the deed of assignment, and were privies to the transaction, attempted to set it up as an act of bankruptcy.

BAYLEY J. At the time when *Burgess* signed the deed, he was ignorant of an act of bankruptcy. When he received the 2*s*. 6*d*. in the pound, he contemplated that he should receive an indefeasible payment; but afterwards, finding himself mistaken, he resorts to another course; and I do not see any reason why he should go on under a deed executed in ignorance, and under concealment. The bankrupt was guilty of a fraud, by concealing instead of disclosing an act of bankruptcy, which distinguishes this case from *Bamford* v. *Baron*.

ABBOTT J. The creditor was not bound to go on under an invalid security.

Rule refused.

(a) 2 *T. R.* 594. *n*.

Saturday, June 15th.

OLDENSHAW *against* THOMPSON.

In covenant, upon non est factum, with a notice of set-off, the defendant cannot go into evidence upon the set-off.

IN covenant by the plaintiff as executor, upon an indenture of lease, made by the testator to the defendant, of a messuage and premises and fixtures, for three years and a quarter's rent, the defendant pleaded *non est factum*, and gave a notice of set-off for money paid to and for account of the testator in his life-time. At the trial before Lord *Ellenborough* C. J., at the last *London* sittings, his Lordship having refused to admit evidence upon the set-off, there was a verdict for the plaintiff.

Scarlett now moved for a new trial, and referred to stat. 2 *G.* 2. *c.* 22., which enacts, that where the plaintiff sue as executor, and there are mutual debts between his testator and the defendant, one debt may be set against the other, and such matter may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require, so as, at the time of pleading the general issue, where any such debt is intended to be insisted on in evidence, notice be given of the debt so insisted on. Wherefore, in *Gower* v. *Hunt* (*a*), it was adjudged, in a case like the present, contrary to what *Denton* J. had ruled at the trial, that the evidence ought to have been received; for the general issue mentioned in the act must be understood to be any general issue. And though it might be doubtful, upon this statute alone, whether the evidence offered

(*a*) *Bull. N. P.* 181. *Barnes*, 290, 291. 3d edit.

at

1816.

OLDENSHAW *against* THOMPSON.

at the trial was admissible, inasmuch as the plea of *non est factum* is not, strictly speaking, the general issue, notwithstanding it be commonly termed so in covenant, yet the stat. 8 G. 2. c. 24. has left no doubt, because, by that statute, mutual debts may be set against each other in all cases, except where either of them accrue by reason of a penalty in a bond or specialty, in which case it must be pleaded. Therefore, subject to that exception, it now seems, that mutual debts may be set against each other in all cases, without pleading it.

Lord ELLENBOROUGH C. J. A good reason was, I remember, suggested at the trial, why the defendant should not go into this evidence, namely, that it would operate as a bar; and certainly it is a misconception of what is the general issue to say that *non est factum* is that plea. The general issue means such a plea as puts the whole in issue, which *non est factum* clearly does not. I cannot help thinking, that Mr. Justice *Denton's* opinion at *nisi prius*, was more correct than that of the Court afterwards.

BAYLEY J. *Non est factum* is not the general issue, for it only puts in issue the deed; and how is the judgment to be entered, supposing the defendant should fail upon the *non est factum*, but prove his set-off?

ABBOTT J. I have often heard it doubted, whether there is any general issue in covenant.

The Court refused the rule upon this point, but granted a rule nisi, upon affidavit, to set aside the verdict, on payment of costs, withdrawing the plea, and pleading specially.

1816.

Saturday, June 15th.

WARWICK and Another *against* COLLINS.

Land which is of a good natural quality shall pay tithe immediately, notwithstanding the 2 and 3 Edw. 6. c. 13., although the expence attending the breaking it up and liming it exceeds the return made to the farmer in the several first years of cultivating it.

IN this case, which was an action of debt, on the stat. 2 and 3 *Edw.* 6. *c.* 13., for not setting out tithes of barley and oats, in the year 1812, in the parish of *Wetherall*, the cause came on to be tried a second time, before *Richards* B., at the last *Cumberland* assizes, in pursuance of a rule of this Court. (*a*) Nearly the same evidence was given as on the former occasion, and it was likewise proved, that the quality of the land was as good as the average of the old inclosed lands; that in 1813 it was again sown with oats, and the crop was rather better than the first year; that in 1814 it produced a good crop of turnips, and in 1815 another crop of oats, which, in some parts, were very good, but in others failing. As to the barley, the half acre, in 1812, was more abundant than that grown on the old inclosed land in the neighbourhood, and of as good quality. The whole expence of ploughing, sowing, and harrowing this land, and of the seed, was estimated at about 11*l.* per acre. With respect to the general course of husbandry, applicable to lands of this description, it was proved, that when grazing land is ploughed for corn, it is not usual to plough it three times, it is usually sown after the first ploughing; but if the land has lain a long time without ploughing, it is usual, on breaking it up, to use lime. As to the use of lime, it was stated that, when land has not been ploughed before, it is not usual to convert it into tillage without lime; the proper quantity of which

(*a*) See *ante*, vol. 2. p.349.

is

1816.

WARWICK *against* COLLINS.

is about thirty bushels per acre. The use of lime is to dissolve the moss, and destroy the integuments more readily than the mere exposure to the air, after ploughing, can do. In the absence of lime, a longer fallow becomes necessary, and a more distant crop may be expected. One of the witnesses swore, that the necessity of using lime depended on the state of the land, and not upon its natural quality; that if land of a good natural quality has remained long unploughed, it requires lime, not indeed in such large quantities as land of a bad quality. The effect of lime is to neutralize the acid in a barren soil. The land in question was about twelve miles distant from any lime-pits, so that a team could only go once a day, and the expence of liming was estimated at about 1*l.* per acre. One of the surveyors proved that he did not consider forty bushels as an extraordinary quantity of lime for land which had never been broken up before; that the soil of the land in question was of a very good natural quality, and was, in the years 1813 and 1814, worth 40*s.* per acre, to be let for seven years, the tenant being at the expence of cultivation. The defendant, as before, gave no evidence, but argued, from the plaintiffs' evidence, that the land was barren, within the meaning of the statute. The learned Judge referred the jury, as to the law, to the judgment of the Court, when the rule for a new trial was made absolute. (*a*) The jury found for the defendant. In the following term a rule nisi was obtained for setting the verdict aside.

Scarlett, *Hullock*, *Littledale*, and *Tindal*, who shewed cause, argued from the evidence, that this was land

(*a*) See *ante*, vol. 2. p. 356.

1816.

WARWICK against COLLINS

which required an extraordinary degree of manurance, and therefore was, according to the authorities, barren within the meaning of the act. Nothing but its being barren could account for the use of lime in the present instance, because lime is never used upon land, of ordinary fertility, when it is first broken up for a crop of oats. The quantity also used in this instance, as well as the distance from which it was brought, indicated, that without a very extraordinary expence in the manurance, the land could not have been brought into a state of cultivation, which is the test whereby to judge of "barren" within the meaning of the statute. Barrenness, in the sense of the statute, does not mean a positive incapacity to produce any thing (for scarce any land is of that description), but a relative inaptitude to culture, taking into consideration the pains and expence of bringing it into cultivation at all.

Richardson, *J. Williams*, and *Law*, contrà, argued that it would be strange to call that land "*suâpte naturâ sterilis*," which, upon being broken up, should produce successive crops in the first five years, without any additional expence in the manuring after the first year. Yet such being the land in this instance, it was, by the present verdict, found to be *barren*. The jury proceeded upon an erroneous principle, by entering into nice calculations of the expence of procuring lime; as if the quality of the land were to be determined by the greater or less facility of obtaining manure for it. So far from it, a reference to the authorities will shew, that the necessary expence of obtaining the first crop has never been taken into the account, to form a criterion, whether land be exempted from tithe or not.

In

1816.

WARWICK *against* COLLINS.

In *Sherington* v. *Fleetwood* (*a*), *Witt* v. *Buck* (*b*), and *Stockwell* v. *Terry* (*c*), tithe was holden to be payable, and yet the lands were not cleared without much expence. So here, the use of lime was only a mode of clearing the land, the effect of it being to destroy the moss and integuments, and to dissolve the vegetable matter: it was not used on account of the barrenness of the soil. To constitute land barren, within the meaning of the statute, it should be shewn, that the land, after the removal of all incidental incumbrances, cannot, without very extraordinary expence of cultivation, be made ordinarily productive, comparing it with other land in the neighbourhood; the contrary of which was proved in this case. Perhaps the word "expence," which is in the concluding sentence of the judgment in the former case (*d*), is not sufficiently explicit, since it might be imagined, that expence, in a pecuniary sense, was the thing signified, whereas the meaning is, the quantity of labour and pains.

Lord ELLENBOROUGH C. J. The question in this case is, whether this land comes within the description mentioned in the statute, that is, "such barren heath or waste ground, which, before this time, have laid barren and paid no tithes, by reason of the same barrenness." We are now to decide upon the meaning of the word *barren* in the statute, with reference to what appears by the evidence. In the course of the argument, it occurred to me, that so far as related to the barley, there was an end of the question; because as

(*a*) *Cro. Eliz.* 475. (*b*) 3 *Bulst.* 166.
(*c*) 1 *Ves.* 117. (*d*) *Ante*, vol. 2. p. 362, 363.

to

1816.

WARWICK *against* COLLINS.

to that crop, it did not appear that any greater quantity of lime was used than is ordinarily used for the cultivation of a crop of that description; and, therefore, that part of the case seemed to stand clear of the objection, as it applies to the oats. Upon further consideration, however, I think, that the verdict is improper, as well with respect to oats as to barley. The whole evidence is to be considered with reference to the question, whether the land was intrinsically barren, or, in the language of the law, "*suâpte naturâ sterilis*," that is, in its own nature and quality. The onus lies upon the defendant, who claims exemption, to shew, either by evidence in chief, or by cross examination, expressly, or by reasonable inference, that the land is barren. As to any express evidence, when I find that one witness says that it is good land, another, that it is of a good quality, and that all establish the soil to be good, how am I to conclude from this that it is barren? But it is sought to raise the inference that it is barren in this way. Thirty-five or forty bushels of lime per acre appear to have been used; and these thirty-five or forty bushels, owing to the remoteness of the lime-pits from which the lime is procured, much exceed the ordinary value; and hence we are called upon to infer that the land is naturally barren; as if either the fertility of the soil or its inaptitude to cultivation can depend upon the remoteness or juxta-position of lime-pits. The expence of procuring the lime will, indeed, vary with this circumstance; and here, I think, the learned counsel who addressed the Court last has well observed, that there is a laxity of expression in the term "expence," which is to be found in the last sentence of our former judgment in this case; and I agree that "expenditure" would

1816.

WARWICK *against* COLLINS.

would have been the more correct phrase, "expence" denoting something of a pecuniary nature. Taking it, then, that forty bushels of lime per acre were expended, I advert to the argument of Mr. *Williams*, that the use of lime was to be considered only as a mode of removing incidental obstructions and incumbrances. The argument was urged ingeniously with reference to the cases of *Sherington* v. *Fleetwood*, and *Witt* v. *Buck*, from which it was inferred that the removal of incidental incumbrances is not to be set down to the account of extraordinary expence. In some cases water impedes the progress of cultivation, in others roots; in the present case, whins and furze; all these must be removed by the respective processes applicable to their removal, before the expence of cultivation can properly be said to begin. The use of lime may be a process for the extinction of some of these impediments, although it is not laid on the land until after ploughing; because it may operate to break and pulverize the indurated masses. And this effect seems to be perceptible in the present instance: for we find that in every successive year there was an improved crop; from which it is clear that the lime was gradually destroying the impediments, its operation not being confined to the first crops, but extending to the others in succession. So that, if the expence of liming could be taken into the account, it must be distributed over the four successive crops. But I am not able to pronounce that it was used at all with reference to any natural infecundity of the soil. What is there to shew that the soil was inapt by nature, and that it required some very extraordinary expenditure of labour and means to overcome this inaptitude? In the absence of any such proof, I am

1816.

WARWICK *against* COLLINS.

am at a loss to say, in contradiction to the witnesses who declared it to be land of a good quality, and to be a good soil, that this land was, within the meaning of the statute, naturally barren, because lime has been laid upon it in a larger quantity, perhaps, than is usual; more especially when this may be referred to the removal of incidental impediments. With reference, therefore, to the oats, as well as the barley, on which I cannot see any doubt, there does not appear to be evidence on which we can safely infer the natural sterility of soil. The distance of lime-pits cannot surely form a consideration in the question of the natural barrenness of land: it never can be called barren because it lies a certain number of miles from lime. Whole counties might, according to this, be set down as barren.

BAYLEY J. With respect to the barley, there certainly was evidence to prove that it was a good crop; and if the witnesses who spoke of the lime meant to confine the use of it to the land sown with oats, there might be a ground for a new trial; but I do not find that the barley crop was made a point upon the motion for this rule, or that any dissatisfaction has been expressed by the learned Judge; and I cannot help thinking that the evidence as to the lime was applicable to the barley as well as the oats. With respect to the main question, I find that the statute does not merely say, "*barren heath or waste ground,*" but adds, "*which has laid barren, and paid no tithes by reason of the said barrenness.*" The statute, therefore, is not confined to land absolutely barren, but extends to such as has lain in an unproductive state by reason of its barrenness. We are here to enquire why the

1816.

WARWICK *against* COLLINS.

the land has lain in an unproductive state; and if we find that it is on account of the extraordinary expence attending its cultivation, then, I think, the land may be deemed "barren," within the meaning of the statute, and entitled to the statutable exemption. Lord *Coke* speaks of "great charge and industry (*a*);" and Lord *Hardwicke* of "expence." (*b*) Mr. *Williams* has referred to several cases, which may, however, be disposed of without difficulty. *Sherington* v. *Fleetwood*, and such-like cases, establish this, that in the enquiry whether the land be barren, you are not to take into consideration the necessary expence incurred in removing fortuitous obstructions, as water, stone, &c.; or, in other words, that which is done to reduce the land into a fit state to be cultivated: that is, as it strikes me, into a fit state to be ploughed; after which, all expenses necessary to bring the land into a productive state shall be taken into the account. Now, in this case, if, as it has been said, the lime was used for the purpose of removing obstructions only, and not for that of cultivation, the question might have been distinctly put to and answered by the witnesses. I cannot suppose but that the jury understood the purpose, and that it was for the cultivation of the land. Nor does it appear to me, that it was improper to take into the account the distance of the lime-pits, because land might well be suffered to lie in a barren state by reason of its barrenness, if, from the distance of manure, it was not worth the expence of redeeming it. Suppose land which requires marl: some may be within a mile of a marl-pit, other twenty miles off. If it be asked in

(*a*) 2 *Inst.* 656. (*b*) 1 *Ves.* 117

such

1816.

WARWICK *against* COLLINS.

such case, if tithe shall be paid for the one and not the other; I answer in the affirmative; and my reason is, because you have the means of making the one productive, or breaking it up; in the other, you have not. If, indeed, the argument be well founded, that because both were upon an equality at first breaking up, both are therefore equally titheable, I admit that my reason fails; but I deny that you are to look to the natural quality alone, and not to the relative quality of the land. If you cannot bring the land into a state of productiveness without an extraordinary pecuniary expence, then, as it seems to me, according to the authorities, the land is within the exception of the statute. I am aware that some of the witnesses spoke of the land as being a good soil, and worth 40*s.* per acre, or more; but, at the same time, it must be admitted, that it was for the jury to decide, on their credit, as to this point. The jury were probably persons who knew the land in the neighbourhood, and the cultivation it required; and if they were the fit persons to decide, it is very difficult for us to say they have come to a wrong decision. But further, as to the land being worth 40*s.* per acre, I find that in the first year (1811) it was ploughed, limed, harrowed, and afterwards in fallow. During that year, therefore, although considerable labour and expence had been bestowed upon it, there was no produce. In the next year there was a crop. I believe it was not in evidence, upon this last occasion, what the value of that year's produce was: upon the former trial, there was some evidence of its value. It is now in evidence, that the expence of ploughing, sowing, and harrowing, came to 11*l.* per acre. According to the former

report,

1816.

WARWICK *against* COLLINS.

report, the expences of clearing, ploughing, and harrowing, including lime, with the expence of sowing and reaping, made a total of 13*l.* per acre. In the second year, then, a crop is obtained, which produces 8*l.* per acre. Putting the rent at 2*l.* per acre each year, the whole expences for the two years, according to the former report, would be 17*l.*, and the return 8*l.* Thus, at the end of the second year, the farmer is out of pocket 9*l.*, exclusive of the tithe. In the third year, he gets a crop worth, according to the former report, 11*l.* 12*s.* per acre. Put the expences of this year at 30*s.*, and adding thereto the rent, the farmer will still be deficient at the end of the third year, exclusive of the tithe. At the end of the third year, a fallow would be necessary; and during the fourth year, I doubt whether the land would do more than pay the rent. If so, then, at the end of the fourth year, the expences incurred would not be reimbursed. It would only be in the fifth year, that the farmer would begin to redeem himself from the expence. It seems to me, that this is precisely the case, where there is no beneficial return until the fifth year, which the legislature contemplated as being entitled to exemption, in order to enable the speculator to go through with the undertaking. An ordinary farmer could not have ventured to incur such expence. For these reasons, it strikes me that this was land strictly within the meaning of the legislature; that is, land which, by reason of its barrenness, was out of the ordinary reach of cultivation. And, at all events, I should hesitate to say, that twelve persons, who were acquainted with the mode of cultivation in that county, and with the ordinary expence attending the cultivation of

1816.

WARWICK *against* COLLINS.

of land of this description, had arrived at a wrong conclusion upon such a point.

ABBOTT J. Upon the material question, which arises out of the case of the land sown with oats, my mind has fluctuated considerably. I came to the consideration of the question with a very strong desire to sustain the verdict, if, upon a right application of the evidence to the law of the case, such verdict could be sustained. In the result, however, after hearing all the arguments on both sides, and after considering the question with the more anxiety on account of the difference of opinion that exists, I must say, that I think the verdict cannot be sustained, and therefore there ought to be a new trial. The question turns upon the construction of a statute, which has been frequently under consideration. The land exempted by that statute is described as "barren heath or waste ground, which has laid barren, and paid no tithes by reason of the same barrenness." I think that these words, "*barren*" and "*barrenness*," so studiously repeated, were intended to denote the natural quality and state of the land, and not any incidental or extraneous circumstances, by which barrenness may be imputed to it; and being of this opinion, upon the legal construction of the words of the statute, I proceed to observe upon the evidence. In the first place, it is entirely on one side; and if the witnesses for the plaintiff had spoken incorrectly, as to any matters of fact, they might have been contradicted by other witnesses on the part of the defendant; or if, in delivering their testimony upon matters of opinion, those opinions had been supposed erroneous, they might have been controverted by the opinions of other

wit-

1816.

WARWICK *against* COLLINS.

witnesses. With respect to the question of barrenness, there is not, I believe, one witness who describes the land as being a bad soil; but there are four witnesses who say that it is a good soil, by which I understand them to mean, a good natural soil; and if this be a correct account, it does, according to my construction of the statute, entitle the plaintiff to his tithes, as it precludes the defendant from claiming the benefit of the exemption of the statute. Two of the witnesses, as I understand them, said, that, in their opinion, the land was worth forty shillings an acre, upon a lease for seven years, to a tenant, such tenant to bear the whole expence of bringing it into cultivation. If that be so, it is impossible to admit that the land was barren. But it is argued, that this is only matter of opinion, and that the jury were as good if not better judges of these things than the witnesses, and might well reject the evidence, and form their verdict upon their own knowledge and experience. To this I cannot quite accede. If the character of witnesses be unimpeached, and they speak to facts known to themselves, and not involving any improbability, I feel a difficulty in saying that a jury is at liberty to reject such testimony, and find a verdict upon their own opinion. There is a known mode by which a juryman, if he is acquainted with any matter, may be allowed to prove it; which being the mode pointed out by law, it would be a dangerous precedent to hold, that a jury may give a verdict merely on their own opinions, in contravention of all the evidence given by witnesses of unimpeached credit. The main stress of the argument to-day has been upon the great expence of bringing lime to this spot. As to the quantity, several of the witnesses declare that it was not

 used

1816.

Warwick *against* Collins.

used in a very unusual quantity; but I ask, whether it could have been contended that this was barren land, if it had been within a mile's distance of a lime-pit, instead of being twelve miles off? Mr. *Scarlett* argued upon this part of the case, that the bringing lime from such a distance was an evidence of the barrenness of the land; and I was at first struck with the argument; it was, however, only evidence that lime was necessary, and if the quantity was not such as shewed the barrenness of the land, I confess I do not see how the price of the lime, by reason of the distance, could be brought into the account; for that would be to make the criterion of barrenness depend on extraneous and accidental circumstances, and not upon the natural quality of the land. Upon the general question, therefore, I should be prepared to say, that it ought to be submitted to another jury. Upon the other point, as to the barley land, the plaintiff's case is unanswered. It was proved, that the land had been sown and borne a good crop; and the witnesses, who speak as to the lime and expence, confine their evidence to the oat-land.

Holroyd J. In this case it appears to me, as well as to my Lord and my Brother *Abbott*, that there ought to be a new trial. With respect to the meaning of the word "barrenness," in the statute, I think it must be understood, as regarding the natural quality of the land; and if so, the evidence is decisive, because two of the witnesses speak of the land as being a very good natural soil, and others speak of it as being equally good with the old inclosed land. Taking their evidence to be correct, this verdict cannot, according to my construction of the statute, be supported. The de-

 fendant

1816.

WARWICK *against* COLLINS.

fendant rests the ground of his exemption upon what appears in the plaintiff's case. If the witnesses are not mistaken, there is an end of the case; and if they are, what evidence is there to bring the land within the exemption, except that which respects the lime; but what is the effect of that evidence? The quantity laid on is, as appears, no more than is frequently, and, indeed, generally used, when land is ploughed for the first time. But whether that be so or not, the witnesses describe its object and effect to be to dissolve the integuments, and remove the obstructions which prevent the natural quality of the soil from exerting itself. If this be so, this case falls within the principle of the cases alluded to by Mr. *Williams*. It appears to me, therefore, that in every view of the evidence, this is land not of the description intended to be exempted by the statute .It is described as of a good natural quality, and worth to be let at 40*s*. a-year. On these grounds, I am of opinion, independently of the question upon the barley-land, that there ought to be a new trial.

Rule absolute, on payment of costs.

1816.

Tuesday, May 21st.

CHASE and Others, Assignees of WILLIAM and THOMAS HURST (Bankrupts), *against* JAMES and DAVID WESTMORE.

A workman having bestowed his labour upon a chattel in consideration of a price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid; and this, though the chattel be delivered to the workman in different parcels, and at different times, if the work to be done under the agreement be entire. Semble, that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of the contract.

TROVER for a quantity of wheat-meal, fine pollard, coarse pollard, and bran, together with some sacks which were stated in the first count of the declaration to be the property of the bankrupts, and in the second count, of the plaintiffs as their assignees. On the trial before *Graham* B. at the *Hants* spring assizes, 1815, a verdict was found for the plaintiff for 1200*l.*, subject to the opinion of the Court upon the following case:

The bankrupts were, before their bankruptcy, in partnership as mealmen, the defendants were partners as millers. One of the bankrupts, before the act of bankruptcy, applied to the defendants to grind a quantity of wheat, when it was agreed between them that the wheat should be sent by the bankrupts in their vessels, and that the defendants should grind it at 15*s.* per load, for which sum the defendants were to unload the wheat from the vessels, grind it, find sacks to manufacture it in, and return the meal, &c. when ground, into the bankrupts' vessels in the river near to which the mill was situated. About 19 loads of the wheat were sent at first, afterwards other quantities, making in the whole 146 loads. It was agreed that if any mixture was to take place, one of the bankrupts should correspond with the defendants on the subject, and, in fact, some of the grain was afterwards mixed at his request. At the time of the bankruptcy there remained in the defendants'

1816.

CHASE *against* WESTMORE.

fendants' possession seven loads of wheat unground, 10 of meal produced by wheat which had been ground, 60 bushels of fine pollard, 20 bushels of coarse pollard, 20 bushels of bran, also produced from the wheat ground, and 80 sacks which had been delivered by the bankrupts to the defendants, for the purpose of being filled with the meal ground from the corn. The defendants, on demand made on the part of the plaintiffs, after the bankruptcy, refused to deliver up this property.

And two questions were argued in the last term, by *A. Moore* for the plaintiffs, and by *Gifford* for the defendants: first, whether the defendants had a right to detain this property for their general balance, under the statute 5 *G.* 2. *c.* 30. *s.* 28. Secondly, whether they had a lien on it, in whole or in part, that is to say, for the balance due to them for grinding all the wheat which had been ground by them, or for the grinding only of such part as had been and remained ground in their hands at the time of the bankruptcy. Upon the last point it was argued for the plaintiffs, that a general lien, if it existed, should have been found as a fact, or, at least, should clearly be deducible from the contract; that here the case was silent as to any lien, and the contract neither expressed or implied any such right; on the contrary, it was stipulated, that the defendants were to grind and return the wheat when ground; so that possession was to be given without reference to payment. And the rule laid down by Lord *Ellenborough*, in *Stevenson* v. *Blakelock* (*a*), was this, "that where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise:" so

(*a*) 1 *M.* & *S.* 545.

1816.

CHASE *against* WESTMORE.

that by the special contract in this case, the general lien is gone, 2 *Roll. Abr.* tit. *Justification*, *pl.* 1, 2. Upon the first point, the case *Ex parte Ockenden* (*a*) was referred to; which was said to have been recognized by Lord *Mansfield* in *Green* v. *Farmer* (*b*) as a case which had been well considered; and although *Ex parte Ockenden* had been supposed adverse to *Ex parte Deaze*, yet, upon examination, this would be found otherwise.

For the defendants it was argued, that there was not any authority to warrant the position, that, because a party stipulated for the price, he shall therefore be deprived of his right to detain until that price be paid. In *Stevenson* v. *Blakelock*, where payment was taken in bills, and thereby the time of credit was postponed, the lien was, nevertheless, held to exist. And this right may be enforced, in respect of the whole work done, as in the case of the printer, who was employed to print certain numbers, not all consecutive, of an entire work, and who was held to have a lien upon the numbers not delivered for his general balance. (*c*) This was also an entire work. If the parties had sued, upon the agreement, they must have averred that the price was tendered. So in this action they must prove that they were ready and willing to pay. Upon the second point, he referred to *Ex parte Deaze* (*d*), where Lord *Hardwicke* expresses his opinion, that "it is hard to say, that mutual credit shall be confined to pecuniary demands," and to the remarks of *Gibbs* J. in *Olive* v. *Smith*. (*e*)

(*a*) 1 *Atk.* 235.
(*b*) 4 *Burr.* 2214.
(*c*) 3 *M. & S.* 167. *Blake* v. *Nicholson*.
(*d*) 1 *Atk.* 229.
(*e*) 5 *Taunt.* 58.

Lord

Lord ELLENBOROUGH C. J. observed, that the Court did not think this case necessarily involved the doctrine of mutual credit; but, on the other point, as it involved the consideration of several ancient authorities, the Court would take time to consider.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This case was argued before us last term, and stood over for our consideration, upon the single question, whether a workman, having bestowed his labour upon a chattel, in consideration of a price or reward fixed in amount by his agreement with the owner, at the time of its delivery to him, can, by law, detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We were all of opinion, upon the argument, and still are, that if a right to detain exists in the general case that I have mentioned, the present defendants have a right to detain the goods in question, for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels, and at different times. The general question is of very great and extensive importance. Several authorities were referred to (which I shall hereafter notice) against the right to detain; but if these authorities are not supported by law and reason, the convenience of mankind certainly requires, that our decision should not be governed by them; and we believe the practice of modern times has not proceeded upon any distinction,

1816.

Chase *against* Wetmore.

between an agreement for a stipulated price, and the implied contract to pay a reasonable price or sum; and that the right of detainer has been practically acknowledged in both cases alike. In the case of *Wolf* v. *Summers*, 2 *Campb.* 631., Mr. J. *Lawrence* does not appear to have been aware of any such distinction. It is impossible, indeed, to find any solid reason for saying, that if I contract with a miller to grind my wheat, at 15*s.* a load, he shall be bound to deliver it to me, when ground, without receiving the price of his labour; but that if I merely deliver it to him to grind, without fixing the price, he may detain it until I pay him, though probably he would demand, and the law would give him the very same sum. Certainly if the right of detainer, considered as a right at common law, (and it must be so considered in this case,) exists only in those cases where there is no manner of contract between the parties, except such as the law implies, this Court cannot extend the rule; and authorities were quoted to establish this proposition; but, upon consideration, we are of opinion, that those authorities are contrary to reason, and to the principles of law, and ought not to govern our present decision. The earliest of them is to be found in 2 *Ro. Ab. p.* 92., which, however, is only a *dictum* of *Williams* J.; and it does not appear on what occasion it was pronounced, or that it governed the decision of any case. It is in these words, "If I put my clothes to a tailor to make, he may keep them until satisfaction for the making, *T. T.* 3 *Ja.* K. B., by *Williams* J." — "But if I contract with a tailor, that he shall have so much for making my apparel, he cannot keep them until satisfaction for the making, *T. T.* 3 *Ja.* K. B., by *Williams* J."

This

1816.

CHASE *against* WESTMORE.

This distinction appears to have been acknowledged by Lord *Holt*, in a case of *Collins* v. *Ongly*, *Selw.* N. P. 1280, 4th edit. as quoted by C. J. *Ryder*, in the case of *Brenan* v. *Currint*. But the point was not in judgment before Lord *Holt*, and therefore the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned Judge. The latter case of *Brenan* v. *Currint* is reported in *Sayer*, 224.; and it is, as far as we can find, the only case wherein this distinction was made the foundation of the judgment of any court. It was there carried to the extremest limit; for the contract was only to pay a reasonable sum, which is no more than the law would have implied if the parties had not expressed it. The opinion of *Popham* C. J., in the case of the *Hosteler*, *Yelv.* 66., has sometimes been cited, as an authority for this distinction; but the only distinction plainly expressed on that occasion applies to the sale of a horse for his keep, and not to a detainer of the animal: the Chief Justice there says, "That an inkeeper cannot sell a horse for his keep, where the price of it has been agreed upon, though he may do so if there has been no agreement for the price;" but the power of sale in the case there put has been since denied. See *Jones* v. *Pearle*, 1 *Stra.* 556. The case in *Yelverton* was an action for the keep of the horse; and all that was said by the Chief Justice as to detainer and sale was extrajudicial. It was in the very same year, term, and court, in which the opinion of *Williams* J. is said to have been delivered; and if (as seems very probable) his opinion was delivered on this

occa-

1816.

CHASE *against* WESTMORE.

occasion, it was extrajudicial also. The case of *Chapman* v. *Allen*, *Cro. Car.* 271., has also been quoted on this subject; that case, however, does not appear to have been decided on the ground supposed; but rather on the ground that a person taking in cattle to agist could not detain until the price be paid; or if he could in general do so, yet that in the particular case the defendant was guilty of a conversion as against the plaintiff, who was a purchaser of the cattle, by having delivered them over to a third person, on receiving from such third person the amount of his demand. In *Cowell* v. *Simpson*, 16 *Ves.* 275., the Lord Chancellor considers a lien as a right accompanying an implied contract; and in one passage of his judgment he is reported to have said, "If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing, the one contract destroys the other:" but it is evident, from other parts of the report, that the Lord Chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession; and, consequently, will defeat a claim to the exercise of such a right. And we agree that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract. And if *Williams* J. is to be understood to speak of a contract for the time, as well as the amount of payment, his opinion will not be contrary to our present judgment; and the authorities built upon it will have been founded on a mistake. And we are inclined to think that he must have intended to express him-

1816.

CHASE *against* WESTMORE.

himself to that effect; because the earliest authority that we have met with mentions an agreement for the time of payment, but makes no distinction between an implied contract and a contract for a determinate price. This authority is in the Year-book, *Easter* term, 5 *Edw.* 4. fol. 2. b. "Note, also, by *Haydon*, that an *hosteler* may detain a horse, if the master will not pay him for his eating. The same law is, if a tailor make for me a gown, he may keep the gown until he is paid for his labour. And the same law is, if I buy of you a horse for 20*s*., you may keep the horse until I pay you the 20*s*.; but if I am to pay you at *Michaelmas* next ensuing, here you shall not keep the horse until you are paid." In this passage the law, as applied to the cases of the *hosteler*, the tailor, and the vendor, is said to be the same, and in the latter the sum is supposed to be fixed. The distinction drawn is where a future time of payment is fixed. If so material a distinction as that which depends upon fixing the amount of the price, had been supposed to exist at that time, we think it would have been noticed in this place; and, not being noticed, we think it was not then supposed to exist. So, in the case of *Cowper* v. *Andrews*, *Hobart's Rep.* 41., Lord *Hobart*, speaking of the word "*pro*," "*for*," says, that this word "works by condition precedent in all personal contracts. As if I sell you my horse *for* ten pounds, you shall not take my horse, except you pay me ten pounds, 18 *Ed.* 4, 5. and 14 *H.* 8. 22., except I do expressly give you day; and yet, in this case, you may let your horse go, and have an action of debt for your money; and so may the tailor retain the garment till he be paid for the making, by a condition in law." The reason in the case of sale is given in the

14th

1816.

CHASE *against* WESTMORE.

14th *Hen.* 8. 20. a.; "The cause is for that each has not the same advantage the one against the other; for, the one will have the thing in possession, the other but an action, which is not reason, nor the same advantage." Considering the operation of the word "*for*," as noticed by Lord *Hobart*, whose opinion is confirmed by the cases he refers to, and by others also, no reason can be assigned for saying that it shall not have the same effect in a contract to grind a load of wheat for 15*s*. as in a contract to sell a load of wheat for 15*l*. The former, indeed, is in substance a sale of a certain portion of the time and labour of the miller, and of the use of his machinery. And as it is clear that the miller could not maintain an action upon the contract without averring that he had ground, and was ready to deliver, the wheat; if the other party can by law recover the wheat without averring that he had paid or tendered the price of the grinding, he will have an advantage above the miller; for he will have his goods, and the miller will have only an action. If the distinction which has been contended for on the part of the plaintiff should be allowed, what must be said in those cases where a workman is not only to bestow a portion of his labour on a chattel delivered to him, but also to apply to it some materials or goods of his own, for a fixed price? As in the case of a picture-frame sent to be gilded or varnished, and even in the old case of cloth sent to a tailor to be made into a garment, is the chattel to be retained by the workman, on the ground of his having applied to it his paint or varnish, or thread, or other materials, or must he deliver these to his employer without payment, because he has bestowed his own personal labour in addition to them?

Upon the whole, we think this supposed distinction is contrary to reason, and to that principle in the law which requires the payment of the price and the delivery of the chattel to be concurrent acts, where no day of payment is given; and, therefore, we think the case of *Brenan* v. *Currint*, and the *dicta* on which it appears to have been founded, are not law, and that the judgment in the present case must be for the defendants.

1816.

WESTMORE.

Postea to the Defendants.

GRONING and Another *against* MENDHAM.

Monday, June 17th.

Where plaintiffs, having received an order from defendant for goods, shipped them, and transmitted to him the bill of lading, endorsed, making the goods deliverable to order or assigns, and on their arrival the captain withheld the goods, in consequence of defendant having refused to accept a bill drawn on him for the price; and thereupon defendant recovered in trover against the captain: Held, that plaintiffs might have an action for goods sold and delivered, for the delivery of the goods was complete as between them and defendant, by the delivery on board the ship.

ASSUMPSIT for goods sold and delivered. Plea, non-assumpsit. At the trial, before Lord *Ellenborough* C. J., at the last *Middlesex* sittings, the case was this:

The action was brought toreco ver the price of 50 casks of smalts, which had been ordered by the defendant of the plaintiffs' house at *Hamburgh*. The plaintiffs shipped the casks at *Hamburgh*, on board the *Euphrates*, Captain *Stanford*, making them deliverable by the bill of lading to order or assigns. The plaintiffs, at the same time, advised the defendant by letter of the shipment, and inclosed the bill of lading, indorsed, together with an invoice, and valued upon him, by bill at two months, for 531*l*. 10*s*. On the arrival of the ship in the river, after she was reported at the custom-house, the defendant produced the bill of lading to the captain, and demanded a delivery of the goods, tendering

him

1816.

GRONING *against* MENDHAM.

him the freight and charges; but the captain withheld the goods, in consequence of the defendant's having refused to accept the bill. The defendant, thereupon, brought trover against the captain, and recovered. Under these circumstances, the jury found for the plaintiffs.

Topping now moved for a new trial, and objected to the plaintiffs' right to recover in this form of action; for although, in many cases, a delivery on board a ship may amount to a delivery to the vendee, yet it is not always so; and, in this case, it was incomplete, by reason of the refusal of the captain. In like manner, if goods be stopped, *in transitu*, the owner shall not have an action for goods sold and delivered, because, by the stoppage, the delivery has been prevented.

Lord ELLENBOROUGH C. J. The delivery may be complete, as between vendor and vendee, by shipment of the goods, though the captain may be guilty of a contravention of his duty, in refusing finally to deliver them. The captain has been so found upon this occasion, and a verdict in trover has, therefore, passed against him. Yet this will not affect the delivery in point of law, as far as it concerns the vendor, if it was once complete, by putting the goods on board, nor his right to recover, as for goods sold and delivered. Suppose this had been a delivery into the warehouse of the vendee, and the goods had afterwards been wrongfully taken away by the vendor, that would not have destroyed the vendor's right of action as for goods sold, though it might have afforded the vendee a cause of action of another sort, as for the tortious taking. So here

here the delivery, by putting on board the ship, being complete, the subsequent detention by the captain, whether it was in collusion or not with the plaintiffs, does not alter this case. The defendant, we find, demands the goods, claiming them as his own property, which could not be, except by considering them as having become so by delivery on board the ship. If they were his property, the vendors who had put them on board are entitled to demand the price. Whether the plaintiffs be guilty of a subsequent tort, in collusion with the captain, or not, does not affect the present action.

BAYLEY J. If this were a case of stoppage *in transitu*, I should have thought the verdict ought not to stand. But it seems to me that this is not so. There has been a complete delivery, as it seems to me, the same as if the goods had been delivered at the vendee's warehouse; and if the vendor was afterwards to go to the warehouse, or any one in collusion with him, and carry away the goods, that would not change the nature of the original delivery. The goods were originally bought, and were to be delivered, and they were put on board a ship. That might or might not be a complete delivery; the captain, however, does not deliver them. If the prior delivery was incomplete, the plaintiffs might have stopped them *in transitu*, but the defendant has treated it as complete, and has brought trover against the captain for detaining the goods, and recovered damages, not only for their detention, but for their value, which may, perhaps, be of greater amount than the price he agreed to give for them to the plaintiffs. He has, therefore, affirmed the de-

1816.

GRONING *against* MENDHAM.

delivery, and, by electing to bring trover against the captain, has given the captain a right to the goods, when he shall have made satisfaction for them. On the short ground, then, that the defendant himself has acted under the idea that the delivery was complete, I think he cannot now say that it was incomplete.

HOLROYD J. (*a*) I am of opinion, in this case, that the defendant, by bringing trover against the captain, has affirmed the delivery to himself. The delivery on board the ship being a complete delivery, he brings trover, the form of which action required him to state that he was possessed of the goods, and that the captain wrongfully took them out of his possession; and the property in the goods is the very gist of the action. Having thus brought trover, in which he could not have recovered unless the goods were proved to be his property, it seems to me that he cannot now say that they were not delivered to him. I think, therefore, there ought not to be a new trial.

Rule refused.

(*a*) *Abbott* J. was absent on a special commission.

1816.

SPRIGENS *against* T. NASH and H. NASH.

Monday, June 17th.

Submission to the arbitrament of two, and in case they disagreed to the umpirage of a third, so that the arbitrators made their award on or before a day certain, and the umpire, if they should differ, before a subsequent day: and the umpire made his award before the time given to arbitrators expired: Held that the umpirage need not state that the arbitrators had disagreed.

BY a Judge's order, (dated 4th *December*, 1815, and afterwards made a rule of Court) it was ordered, that this cause should be referred to two arbitrators, and in case of their disagreement, then to the umpirage of such third person as they should appoint; so that the arbitrators should make their award on or before the 1st of *January*, and the umpire, if they should differ, should make his umpirage before the 23d of *January* then next. On the 29th of *December*, 1815, the arbitrators enlarged the time for making their award to the 23d of *February*, and that of the umpire to the 1st of *March* then next. On the 13th of *February*, the umpire made his umpirage, without stating therein that the arbitrators had disagreed.

And because the umpire had made his umpirage within the time limited to the arbitrators, without shewing, on the face of his umpirage, that the arbitrators disagreed, a rule nisi was obtained for setting the umpirage aside.

Against which rule the Attorney General and *Reader* now shewed cause, and cited *Smailes* v. *Wright*. (a)

Topping and *Lawes*, who were called upon to support the rule, argued that it was essential to the validity of the umpirage, to shew the umpire's authority; for his being but a substituted authority in default of the arbitrators, could not be acted upon until default made; so that the umpirage should have set forth, either that the

(a) *Ante*, 3 vol. 559.

1816.

SPRIGENS *against* NASH.

time allowed to the arbitrators had expired, or that they had disagreed within the time; whereas, it now appears, that the umpirage was made within the time allowed to the arbitrators, and it is not shewn that there was any disagreement. The umpire, therefore, must be taken to have proceeded without authority.

Lord ELLENBOROUGH C. J. It is satisfactory to know, that in deciding this case, if we should fall into any error, it will be competent to us to correct it during the term. My present impression, however, upon the argument is, that this award is well made. The argument of Mr. *Topping* would have struck me very forcibly, if, by law, it were necessary for an arbitrator or umpire to deduce his authority strictly from regular premises upon the face of his award. But I take this not to be necessary. If, indeed, it appears negatively upon the face of an award, that the arbitrator has not authority, as if, in the present instance, it had appeared that the arbitrators had not disagreed, the case would be different; but the objection is not that the umpire has negatived his authority, but only that he has omitted to state it affirmatively. The umpirage is made within the time; but it has been laid down, that the umpire may proceed by anticipation; and, if not intercepted by any act of the arbitrators, such an award, would, I conceive, be good. In *Smailes* v. *Wright*, it appeared, that the arbitrators disagreed; and in that respect the two cases differ; but I think that does not make any substantial difference.

BAYLEY J. Unless we see clearly that the objection made to this award is a valid one, we ought not to set

1816.

SPRIGENS *against* NASH.

it aside, because we may thereby be working injustice; whereas no prejudice can arise from suffering the award to stand, inasmuch as the objection, if good, is apparent on the face of the award. The objection is, that the umpirage was made before the expiration of the time allowed to the arbitrators, without shewing that the arbitrators disagreed. If the fact be, that there was no disagreement, the party will never be able to enforce the umpirage; but if a disagreement really existed, then it comes to this question; is it essential that the umpire should set forth his authority upon the face of the award? I have always understood that it is not necessary; but that it is sufficient, in drawing up an award, to state generally, that, by virtue of the submission, the arbitrator or umpire makes his award. If that be so, it seems to me, that it is an answer to the objection.

HOLROYD J. (*a*). I am of the same opinion. If we were to set aside this umpirage, upon wrong grounds, we should leave the party, in whose favour it was made, without remedy; because he cannot have a writ of error; but in suffering it to stand, we do not work a like prejudice, because the other party may still insist upon his objection. The objection is, that it does not appear, upon the umpirage, that the arbitrators disagreed; but I take it to be clearly settled, that an award need not set forth the authority of the arbitrator. It is otherwise in the case of orders of magistrates; because they are to operate *in invitum* against third persons; and so in the case of warrants; but with respect to an

(*a*) *Abbott* C. J. was absent on the special commission.

1816.

SPRIGENS *against* NASH.

award or umpirage, the authority being created by the act of the parties, it is to be presumed that they are cognizant of it.

Rule discharged.

Monday, June 17th.

JORDAN *against* STRONG.

The defendant's pleading a tender to an action for goods sold, does not preclude him from entering a suggestion on the roll to deprive the plaintiff of his costs under stat. 39 & 40 *G.* 3. *c.* 104. s. 12 (*London* Court of Requests act.)

IN assumpsit for goods sold, &c., to which the defendant pleaded a tender of 4*l.*, and *non assumpsit* as to the residue; the cause was referred to an arbitrator, who directed the verdict to be entered for 5*s.*: and upon a rule nisi to enter a suggestion upon the roll, in order to deprive the plaintiff of costs, under statute 39 & 40 *G.* 3. *c.* 104. (local act), that the action was commenced for a debt not exceeding 5*l.*, and recoverable by virtue of the said act, and that the defendant, at the time of the commencement of the action, was a person keeping a warehouse, and seeking a livelihood, and trading and dealing within the city of *London*, &c.

Reader shewed cause, and objected, that the defendant, by pleading a tender, and paying the 4*l.* into Court, had waived the benefit of the act, which was passed in ease of defendants; and it is a maxim, that a party may waive that which is for his benefit. Here the defendant, if he had intended to avail himself of the act, should have stood upon the act alone, without pleading a tender; for by such plea, he has recognised the cause of action, and that it was well brought. Also, by paying the money into Court, he compelled the plaintiff to go on with the action, in order to obtain the money out of Court:

Court; and if the plaintiff had stopped, after taking the money out of Court, he would, by reason of the plea of tender, have been subject to costs.

Lawes, contrà, argued, that the act does not deprive this Court of jurisdiction in cases where the debt does not exceed 5*l.*, giving jurisdiction, exclusively, to the inferior court, as in the *Westminster* Court of Requests act; and, therefore, the defendant could not plead the act in bar. (*a*) But here, the jurisdiction of this Court being concurrent, the defendant was bound to plead to the action; and being bound, his pleading to it shall never operate as a waiver, which imports a voluntary act on his part.

Lord ELLENBOROUGH C. J. referred to *Sandby* v. *Miller* (*b*), as an authority for granting the present application. There the defendant paid money into Court, and yet was allowed to enter a suggestion on the roll like the present. And he added, that the suggestion and plea of tender would be on the record, and, therefore, if the effect of that plea was to preclude the defendant from having the suggestion, the plaintiff would still have the benefit of the objection.

Reader then made another point, that the original demand was reduced below 5*l.* by a set-off; but that failing, the Court (*c*), made the rule absolute.

Rule absolute.

(*a*) See 3 *T. R.* 452., *Taylor* v. *Blair*. 1 *East*, 352., *Parker* v. *Elding*.

(*b*) 5 *East*, 194.

(*c*) *Abbott* J. was absent upon the special commission.

1816.

Tuesday, June 18th.

DIXON *against* BELL.

The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care: therefore, where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off: Held that the defendant was liable to damages in an action upon the case.

CASE. The plaintiff declares that the defendant was possessed of a gun, then being in a certain messuage, situate, &c.; and that he, well knowing the same to be loaded with powder and printing types, wrongfully and injuriously sent a female servant to the said messuage, to fetch away the gun so loaded, he well knowing that the said servant was too young, and an unfit and improper person to be sent for the gun, and to be entrusted with the care or custody of it; and which said servant afterwards, and while she was so sent and entrusted by the defendant, and had the custody of the said gun accordingly, carelessly and improperly shot off the same, at and into the face of the plaintiff's son and servant, and struck out his right eye and two of his teeth, whereby he became sick, &c., and was prevented from performing his lawful business, and the plaintiff was deprived of his service, and put to great expence in procuring his cure, &c. There was a second count, for taking such improper care of the gun, knowing that it was loaded, that the gun was afterwards discharged against the plaintiff's son, &c. Plea, not guilty. At the trial, before Lord *Ellenborough* C. J., at the last *Middlesex* sittings, the case was thus:

The plaintiff and defendant both lodged at the house of one *Leman*, where the defendant kept a gun loaded with types, in consequence of several robberies having been committed in the neighbourhood. The defendant left the house on the 10th of *October*, and sent a mulatto girl,

1816.

DIXON *against* BELL.

girl, his servant, of the age of about thirteen or fourteen, for the gun, desiring *Leman* to give it her, and to take the priming out. *Leman* accordingly took out the priming, told the girl so, and delivered the gun to her. She put it down in the kitchen, resting on the butt, and, soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a child between eight and nine, saying she would shoot him, and drew the trigger. The gun went off, and the consequences stated in the declaration ensued. There was a verdict for the plaintiff, damages 100*l*.

The Attorney General moved for a new trial, on the ground that the defendant had used every precaution which he could be expected to use on such on occasion, and, therefore, was not chargeable with any culpable negligence.

Lord ELLENBOROUGH C. J. The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved, that the order to *Leman* was not sufficient; consequently, as by this want of care, the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable.

1816.

DIXON *against* BELL.

BAYLEY J. The gun ought to have been so left as tó be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touch-hole.

Per curiam, (*a*) Rule refused.

(*a*) *Abbott* J. absent.

Tuesday, June 18th.

BACH *against* MEATS and Another.

A creditor may, with the assent of the debtor, take possession of the goods of his debtor, and remove them from the premises for the purpose of satisfying a bonâ fide debt, without incurring the penalty of stat. 11 *G.* 2. *c.* 19. *s.* 3. against persons assisting the tenant in removing his goods from the premises; although the creditor takes possession knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain.

THE plaintiff declared, that for two years before the 1st *August*, 1815, one *Wm. Graves* was tenant to the plaintiff of a farm, &c. at a yearly rent; that on the 1st *August*, 1815, two years' rent was in arrear; and that certain cattle of the said *W. Graves*, being upon the premises, and liable to be taken by the plaintiff as a distress for the said arrears of rent, the said *W. G.*, on the 26th of *January* 1816, fraudulently conveyed the said cattle from off the said premises, with intent to prevent the same from being distrained by the plaintiff for the said arrears of rent; and that the defendants wilfully and knowingly aided and assisted the said *W. G.* in such fraudulent conveying away the said cattle, with intent to prevent the same from being distrained by the plaintiff for said arrears of rent; and the plaintiff averred that the said cattle were of the value of 300*l.*; whereby and by force of the statute, an action hath accrued to the plaintiff to demand of defendants 600*l.*, to wit, double the value of the said cattle. Second count, That defendants did aid and assist the said *W. G.* in *concealing* the said cattle with intent, &c. Plea, nil debet.

At

1816.

BACH *against* MEATS.

At the trial before *Dallas* J. at the last *Herefordshire* assizes it was proved that *Graves* was tenant, and the rent in arrear, as alleged in the declaration; and it was likewise proved that the defendant, *Meats*, was the brother-in-law, and was a bonâ fide creditor of *Graves*, and that, knowing *Graves* to be in distressed circumstances, and being apprehensive that his goods might be distrained, he went to the premises on the evening of the 25th of *January* 1816, and made a seizure of a number of the cattle, which, with the assistance of the other defendant, and the full knowledge and consent of *Graves*, he drove from the premises early in the morning of the 26th. The seizure made did not exceed in value the amount of *Meats'* demand. The plaintiff's agent followed the seizure, and demanded possession, stating that he had been directed by the plaintiff to distrain; *Meats*, however, refused to deliver up possession, but permitted the agent to take an account of the cattle. A verdict was found, by consent, for the plaintiff for single damages, with liberty to move to enter a nonsuit, if the Court should be of opinion upon these facts that the action was not maintainable. And it was agreed, that all idea of actual fraud should be excluded, the only question intended to be reserved being this, viz. whether the defendant, with a view to the recovery of his own debt, had a right to conduct himself in the manner above stated.

A rule nisi for entering a nonsuit having been obtained in the last term,

Jervis and *Peake* now shewed cause, and referred to stat. 11 *G.* 2. *c.* 19., which empowers landlords to distrain goods fraudulently and clandestinely carried off the

1816.

BACH *against* MEATS.

the premises within thirty days; provided (*s.* 2.) that the goods have not been sold bonâ fide and for a valuable consideration before the seizure to a person not privy to the fraud. And (*s.* 3.) a penalty is imposed of double the value upon the tenant so removing the goods or the person assisting the same. In this case, they contended, the removal of the goods by the defendant, with the consent of *Graves*, for the purpose of withdrawing them from the reach of the landlord, was a fraud in law, and the defendant, being privy to this fraud, did not come within the proviso of the act. And though, according to adjudged cases (*a*), a man may prefer one creditor to another, yet in the case of landlord and tenant the statute interferes to prevent the tenant colluding with a creditor to the prejudice of his landlord. Also, the stat. 8 *Ann.* *c.* 14. prohibits the taking of goods in execution, unless before their removal the party suing out execution shall pay the arrears of rent to the extent of one year's arrear to the landlord. It would be strange, therefore, if the law should have provided for the security of landlords against a judgment-creditor, and yet have left them open to the fraudulent collusion between the tenant and a simple-contract creditor.

Lord ELLENBOROUGH C. J. I own I cannot in this case discover any fraud, either in the creditor's seeking satisfaction from a fund to which by law he is authorised to resort; or in the debtor's giving effect to this remedy. A creditor is at liberty to call on his debtor for payment, and the debtor may arrange the mode of

(*a*) *Holbird* v. *Anderson*, 5 *T. R.* 235. *Pickstock* v. *Lyster*, *ante*, 3 vol. 371.

pay-

1816.

BACH *against* MEATS.

payment as he pleases, by the delivery of money or of money's worth, as cattle or goods, although these, so long as they remain on the premises, will be liable to the landlord's distress. If before any distress made or contemplated the creditor resort to the tenant for satisfaction of his debt, I know of no law to prevent the tenant from consenting to the transfer or delivery of his stock in payment, which he might undoubtedly sell without any imputation of fraud. I therefore cannot perceive any thing fraudulent in this transaction. If it appeared that the tenant had urged the creditor to seek this remedy, the case might have assumed the character of fraud: but where the creditor is the first mover, and the tenant does no more than accede to an arrangement for discharging himself and satisfying the creditor, what fraud is to be imputed to him? It is admitted that a preference may be given to creditors, as in the case of executors, and if a debtor, upon being pressed by his creditor may settle the debt by the delivery of his goods, I see no reason why he may not also accede to the creditor's taking them.

BAYLEY J. I am entirely of the same opinion. I think this case was not within the contemplation of the legislature when it passed this act of parliament. The legislature seems to have had in view a fraudulent removal by the tenant, where the object was to withdraw the property from the landlord's reach, for the purpose of securing it for his own benefit. Such an object may be accomplished either by a clandestine removal of the tenant himself, or by his procuring some other person to make a pretended purchase on the premises, and remove the property under colour of such purchase.

1816.

BACH *against* MEATS.

purchase. And in this case, if *Meats* had been sent for by *Graves*, and urged by him to drive off the stock in order to secure it, the removal would have been fraudulent; but when we find that *Meats* acted upon his own suggestion, and for the purpose of obtaining satisfaction for his debt, as the law entitled him to act, I cannot see any ground whatever for holding this case within the statute. The language of the 3d section of the statute is, "if any *tenant* or *lessee* shall fraudulently convey away, &c." It was argued by Mr. *Peake* as if every removal was fraudulent within the meaning of this act. But if this had been the meaning of the statute, would it have been worded in such a manner as to import a removal by the "tenant or lessee" himself, or at the utmost for his benefit? Was there any such removal here? Unquestionably not. The creditor presses for some security, and seizes a part of the goods, and the tenant, in order to discharge his debt, agrees to their removal, as by law he might do. Where is the fraud in the tenant paying his debt? If it could be said to be fraudulent in any sense, I doubt whether it would be within the meaning of the act; because it would not be the fraud of the tenant or person removing the property for his benefit; for the removal was the act of the creditor. The proviso in the 2d section relates only to such cases as come within the first. The 3d section, on which this action is founded, does not contain any words which carry the case further. If there be a fraudulent removal within the 1st section, the landlord is empowered to follow the property within a given time; and in such case the 3d section adds to the landlord's remedy by distress, a right of action for double the value of the goods against the tenant or the person aiding him in the removal. It

seems

seems to me this is not a case either within the letter or meaning of the act.

1816.

BACH *against* MEATS.

HOLROYD J. (*a*) I am of the same opinion. The third clause does not make every conveying away of the goods of a tenant penal, although it may operate to defeat the landlord's right, but only such conveying away of the goods by the tenant or person aiding him as is fraudulent. This clause, however, which is a penal one, giving a forfeiture of double the value of the goods, does not interfere with the right of a creditor to use all due diligence for obtaining payment of his debt; although by so doing he may possibly intercept the landlord's distress, and may even do it under the impression that the landlord intends to distrain. In the case of *Meux* v. *Howell* (*b*) a distress had actually been made by the landlord at the time the tenant confessed judgment to another creditor for the benefit of himself and the other creditors; and yet this was held not to be fraudulent within the statute of *Eliz.* And it was admitted on all hands in that case that it was competent to a debtor to assign a part of his property in satisfaction of particular creditors, although this might diminish the fund to which the rest of the creditors had to look. And so executors may suffer judgment to one creditor after action brought by another, and plead it in bar to the action. In *Estwick* v. *Caillaud* (*c*), Lord *Kenyon* said, "It is neither illegal nor immoral to prefer one set of creditors to another;" and in *Nunn* v. *Wilsmore* (*d*), "that putting the bankrupt laws out of the question, a

(*a*) *Abbott* J. was absent on the special commission.

(*b*) 4 *East*, 1. (*c*) 5 *T. R.* 424. (*d*) 8 *T. R.* 528.

debtor

1816.

BACH *against* MEATS.

debtor might assign all his effects for the benefit of particular creditors." And as every creditor has a right to use all diligence for the recovery of his debt, it seems to follow that he may obtain payment without regarding whether he thereby postpones payment to another. The statute, as it seems to me, was never meant to extend to the creditor who is seeking payment of his debt bonâ fide, when it enacted, that if any person should wilfully and knowingly assist in such fraudulent conveying away he should be liable to a penalty. Upon these grounds, this action appears to me not to be maintainable.

Rule absolute.

Wednesday, June 19th.

The KING *against* TURNER.

Upon a conviction under stat. 5 *Ann.* c. 14. s. 2. against a carrier for having game in his possession, it is sufficient if in the information and adjudication, the qualifications mentioned in stat. 22 & 23 *Car.* 2. c. 25. s. 5. be negatived, without negativing them in the evidence.

CONVICTION by two justices, upon the statute 5 *Ann.* c. 14. s. 2., against a carrier, for having game in his possession. The conviction was to this effect:

" *W. Taylor* of the parish, &c., cometh before me, *J. M.*, one of the justices of our lord the king, in and for the county of *Surry*, &c.; and then and there giveth me, the said justice, to understand and be informed, that within three months now last past, that is to say, on the 5th day of *February*, now instant, at the parish of *Send* and *Ripley*, in the said county, *John Turner*, of the parish of the *Holy Trinity*, in *Guildford*, in the county of *Surry*, carrier, being a person not then having lands, &c. (negativing the qualifications of the 22 and 23 *Car.* 2. c. 25.) nor then being a person in any manner

qualified

1816.

The KING *against* TURNER.

qualified or authorised by the laws of this realm to kill game, and being then and there a carrier, did then and there unlawfully *have in his custody and possession* sixteen pheasants and five hares, the same not being sent up or placed in the hands of the said *J. Turner*, by any person or persons qualified to kill game, contrary to the form of the statute, &c., whereby he hath forfeited the sum of 105*l.*, that is, 5*l.* for each pheasant and hare." And the conviction prays, that the defendant may be summoned to answer the premises, and that the informer may have a moiety of the forfeiture. "Whereupon the defendant being summoned on the 10th of *February*, in the 56th year aforesaid, &c., appeareth before us, the said *J. M.* and *G. M.*, one other of the justices, &c., and having heard, &c., pleads not guilty. Nevertheless, on the said 10th day of *February*, at &c., two credible witnesses, to wit, *T. T.* and *W. S.* upon their oath, affirm, in the presence of the said *J. Turner*, that within three months next before the said information, to wit, on the said 5th day of *February*, in the 56th year aforesaid, at &c., the said *J. Turner* being a carrier, did have in his custody and possession, in his waggon, at the parish of *Send* and *Ripley*, in the county aforesaid, sixteen pheasants and five hares, the same not being sent up or placed in the hands of the said *J. Turner*, by any person or persons qualified to kill game, contrary to the form of the statute, &c. Whereupon the said *J. Turner*, being asked what he hath to say or offer in his defence, produceth one witness, to wit, *G. T.*, who, being duly sworn, deposeth, in the presence of the said *J. Turner*, and also of the said *W. Taylor*, that on the said 5th day of *February*, at the parish of *The Holy Trinity*, in *Guildford* aforesaid, he was present at, and did aid and

assist

1816.

The KING *against* TURNER.

assist in the packing and loading the said waggon of the said *J. Turner*; and that at the day and parish last aforesaid, when the said waggon of the said *J. Turner* left the warehouse of the said *J. Turner*, in the said parish last aforesaid, there was not in the custody and possession of the said *J. Turner*, in his said waggon, in the parish last aforesaid, any such quantity of game as is above laid to his charge, or any game whatever; and forasmuch as upon hearing the matters, &c. it appears to us, the said justices, that the said *J. Turner* is guilty of the premises; it is therefore adjudged by us the said justices, upon the testimony of the said *T. T.* and *W. S.*, that the said *J. Turner*, on the said 5th day of *February*, at the parish of *Send* and *Ripley* aforesaid, within three months next before the said information was made before me the said *J. M.* by the said *W. T.* as aforesaid, unlawfully had in his custody and possession, sixteen pheasants and five hares, contrary to the form of the statute, &c., and that the same were not sent up or placed in the hands of the said *J. Turner*, by any person or persons qualified to kill game, and that the said *J. Turner* had not then any lands or tenements, or any other estate of inheritance in his own right, or in his wife's right, of the clear yearly value of one hundred pounds per annum, &c. (negativing the other qualifications); and thereupon we the said justices do convict the said *J. Turner* of the offence aforesaid, and do adjudge that the said *J. Turner*, for his said offence, hath forfeited the sum of one hundred and five pounds, that is to say, the sum of five pounds for each and every of the said pheasants and hares: and we do adjudge, that one half of the said sum be paid to the poor of the parish of *Send* and *Ripley* aforesaid, where the said offence

offence was committed, according to the form of the statute, &c.

1816.

The KING against TURNER.

And now it was argued by *Scarlett* and *Ross* that the conviction was ill; first, because the justices have neglected to set forth the evidence in support of the information, and have only stated the conclusion which they drew from it. For the justices have repeated the charge alleged in the information, as if it were the evidence given in support of that charge; but it is impossible to conceive that the witnesses should have deposed in the very same form and words as laid in the information. It was incumbent, therefore, on the justices to set forth the particulars of the evidence and not the result of it, in order that the Court may see that there is sufficient to warrant the conviction. Secondly, it was objected, that it does not appear that any evidence was given in support of the information, negativing the qualifications mentioned in the statute, which is necessary, in order to found the jurisdiction of the justices; for if the party be qualified in any one respect, the justices have no jurisdiction. And herein a proceeding before a justice differs from an action. It seems, therefore, that *primâ facie* evidence, at least, ought to be required; though it must be admitted, that in *Rex* v. *Stone* (*a*), the Court were divided in opinion upon this point.

Lord ELLENBOROUGH C. J. The question is, upon whom the onus probandi lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification

(*a*) 1 *East*, 639.

1816.

The KING *against* TURNER.

to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute (*a*), to which the proof may be applied; and, according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet*, but that the defendant may be qualified under the other. And does not, then, common sense shew, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended? Is not the statute of *Anne* in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other? I remember the decision of *Rex* v. *Stone*; and the arguments of the learned Judges, who held the necessity of giving negative proof, were undoubtedly urged with great force; but I felt at the time, that if they were right, it would, in most cases, be impossible to convict at all. But in *Spieres* v. *Parker* (*b*), I find Lord *Mansfield* laying down the rule, that in actions upon the game laws, (and I see no good reason why the rule should not be applied to informations as well as actions,) the plaintiff must negative the exceptions in the enacting clause, though he

(*a*) 22 & 23 *Car.* 2. *c.* 25. *s.* 3.

(*b*) 1 *T. R.* 144.

throw

throw the burden of proof on the other side. The same was said by *Heath* J. in *Jelfs* v. *Ballard* (*a*); and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of opinion, that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute, is sufficient, without going on to negative, by the evidence, those qualifications.

BAYLEY J. I am of the same opinion. I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative. And if we consider the reason of the thing in this particular case, we cannot but see that it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification. If, indeed, it is to be presumed, that he must be acquainted with the defendant, and with his situation or habits in life, then he might give general evidence what those were; but if, as it is more probable, he is unacquainted with any of these matters, how is he to form any judgment whether he is qualified or not, from his appearance only? Therefore, if the law were to require that the witness should depose negatively to these things, it seems to me, that it might lead to the encouragement of much hardihood of swearing. The witness would have to depose to a multitude of facts; he must swear that the defendant has not an

(*a*) 1 *B. & P.* 463.

1816.

The King *against* Turner.

estate in his own or his wife's right, of a certain value; that he is not the son and heir apparent of an esquire, &c.; but how is it at all probable, that a witness should be likely to depose with truth to such minutiæ? On the other hand, there is no hardship in casting the burden of the affirmative proof on the defendant, because he must be presumed to know his own qualification, and to be able to prove it. If the defendant plead to the information, that he is a qualified person, and require time to substantiate his plea in evidence, it is a matter of course for the justices to postpone the hearing, in order to afford him time, and an opportunity of proving his qualifications. But if the onus of proving the negative is to lie on the other party, it seems to me, that it will be the cause of many offenders escaping conviction. I cannot help thinking, therefore, that the onus must lie on the defendant, and that when the prosecutor has proved every thing, which, but for the defendant's being qualified, would subject the defendant to the penalty, he has done enough; and the proof of qualification is to come in as matter of defence. As to the objection that this evidence is consistent with the supposition, that the game was in the waggon of the defendant, without his knowledge, I think the fact of its being in his waggon, raises a presumption the other way, that it was there with his knowledge. If the defendant could have shewn, by evidence satisfactory to the justices, that he did not know it, that would have presented a very different case; but where the witness has proved that the defendant had it in his custody and possession in his waggon, surely such evidence being unanswered, warrants this conviction.

Holroyd

1816.

The KING *against* TURNER.

HOLROYD J. (a) I also am of the same opinion. It is a general rule, that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. Therefore it must be shewn, that this is a case which ought to form an exception to the general rule. Now all the qualifications mentioned in the statute, are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate, as the statute requires, he may prove it by his title deeds, or by receipt of the rents and profits: or if he is son and heir apparent, or servant to any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the party himself, whereas the prosecutor has, probably, no means whatever of proving a disqualification. If this be so, instead of saying that the general rule of law ought not to apply to this case, it seems to be the very case to which the rule ought peculiarly to apply. The other objections do not appear to me to be well founded; and, therefore, I think this conviction ought to be affirmed.

Conviction affirmed.

Nolan and *Berens* were to have argued in support of the conviction.

(a) *Abbott* J. was absent upon the special commission.

1816.

Wednesday, June 19th.

The King *against* The Inhabitants of Uckfield.

Where pauper, at the time of hiring himself, had a daughter of the age of eighteen, who from the age of four had lived with her grandfather, and had been maintained by him until his death, and afterwards by her grandmother, which continued until she attained twenty-one, the grandfather having by his will directed the grandmother to educate and maintain her out of a fund given to the grandmother for life, and after her decease to the daughter: Held, that the daughter was not emancipated, and consequently pauper was not, within stat. 3 and 4 *W.& M.* a person *not having a child* at the time of the hiring.

UPON appeal, the Court of Quarter Sessions for the county of *Sussex* confirmed an order of two justices for the removal of *James Marshall* from *Hurstperpoint* to *Uckfield*, subject to the opinion of this Court upon the following case:

The pauper, *James Marshall*, being legally settled in the parish of *Uckfield*, on the 10th of *April*, 1802, hired himself for a year to one *Jeffery*, then residing in the parish of *Tonbridge*, in the county of *Kent*, and continued in the service of *Jeffery* in that parish for the whole year. *Marshall* was a widower at the time of his hiring himself to *Jeffery*, and had one daughter, *Frances*, eighteen years of age, who had been separated from him at the age of four years, and had lived with her grandfather until his death in 1801, during which time she was entirely supported by the grandfather, the pauper contributing nothing for her maintenance. The grandfather by his will devised the residue of his estate (which amounted to 1600*l.*) to his executors in trust, to place the same out upon security, and pay the interest to his wife for life for her own use; and he directed that his wife should, during her life, thereout educate and maintain *Elizabeth* and *Frances*, the children of his late daughter *Elizabeth Marshall*, and after the decease of his wife he gave the said residue equally to be divided between the said *Elizabeth* and *Frances*; but in case his wife should die before they attained twenty-one, the interest to be applied to their maintenance and education

1816.

The KING *against* The Inhabitants of UCKFIELD.

cation during their minority, and upon their attaining twenty-one respectively, the principal to be paid to them accordingly; and if either of them should die under age and without leaving issue, her share to go to the survivor; but if either should die under age leaving issue, her share to be equally divided between such issue, as they attained twenty-one, the interest in the mean time to be applied towards their maintenance and education. After her grandfather's death *Frances* continued to live with her grandmother, and was entirely supported by her until she had attained twenty-one, and was living with her at the time when the pauper hired himself to *Jeffery*, and never returned to her father. The question was, if the pauper gained a settlement in *Tonbridge* by this hiring and service.

Courthope and *Long*, in support of the order of sessions, argued that he did not; because his daughter *Frances*, at the time of the hiring and service, not being emancipated, but still dependent on her father's family, the pauper could not, within the intent of the statute 3 and 4 *W. & M. c.* 11. *s.* 7. be deemed "an unmarried person, not having a child." For the distinction is, if the child be in a condition to follow the father's settlement so as to be capable of becoming a burthen to the parish where the father is hired and serves, such hiring and service is not within the statute; *aliter*, if the child be emancipated from the father's family. But a child may be separated from its family without being emancipated; and so long as it is in a state of pupillage, or *durante minoritate*, it is, in the eye of the law, still dependent on and constituting a part of the parent stock, notwithstanding any

1816.

The KING *against* The Inhabitants of UCKFIELD

length or distance of separation, and may return and be incorporated into that stock; and authorities are not wanting to shew that the law respecting emancipation does not operate by relation to the time when the separation first took place, although such separation continue until after the child attain twenty-one. (*a*) Which doctrine applies to the present case, as far as regards the separation of *Frances* the daughter, and her continued residence with her grandfather and grandmother, and the hiring and service of the father. And as to the provision made for her education and maintenance by her grandfather's will, this did not alter the relative situation of parent and child: the assets might have failed *in toto*, or might have been withheld in part or for a time, in which cases the child must necessarily have been remitted to the father for support.

D'Oyly and *Marshall*, contrà, took a distinction, that here the daughter was not only separated at early infancy from her father's family, and maintained by the bounty of others, and continued to live separate until she attained twenty-one, but from the death of her grandfather she became *suo jure* entitled to a maintenance of her own, for such was the effect of the direction in her grandfather's will (*b*): so that from that time, which was prior to the hiring and service, she was no longer dependent on any one for support; and the relation between the parent and child, so far as regards any dependence or support, was completely at an end. And though it be possible that the fund, to which she was entitled in her own right, might fail, may not the same be said of

(*a*) *Rex* v. *Edgworth*, 3 *T. R.* 353. *Rex* v. *Witton cum Twambrookes*, *Ib.* 355.

(*b*) *Eacles* v. *England*, 2 *Vern.* 466.

any

1816.

The KING
v.
The Inhabitants of
UCKFIELD.

any other change of condition, which would clearly have worked an emancipation? As marriage, for instance, or the enlisting for a soldier: both these may fail to afford the provision usually to be expected from them; yet these have been held to work an emancipation. It is sufficient, therefore, that the independence acquired is in its nature permanent: the greater or less probability of its being defeated is not the question. It may be remarked, however, upon this point, if it were material, that the fund provided in the present case, being under the control of trustees, was more than ordinarily protected against failure. Nor does emancipation, with reference to settlement, import an exemption from parental authority. Suppose a child should acquire a settlement by renting a tenement, would it not be thereby emancipated, as to settlement? but would it cease to be subject to parental authority?

Lord ELLENBOROUGH C. J. This is a perfectly new head of emancipation. The question is, if, on account of a testamentary bounty left to this child by her relation, the child shall be deemed to be emancipated from all control of the father, and the father to be discharged from all claims of the child for maintenance, if that should become necessary. If such a provision as this amounts to an emancipation, the consequence will be, that the devolution of an estate to a child, from the mother, for instance, would operate in the same way, and discharge the father from the duty of maintenance. This, then, is quite a new head of emancipation. The cases of emancipation put by Lord *Kenyon* in *Rex* v. *Witton cum Twambrookes*, are the child's attaining its full

1816.

The KING *against* The Inhabitants of UCKFIELD.

age, or being married, or gaining a settlement for itself, or, as in the case of the soldier contracting a relation inconsistent with the idea of his being in a subordinate situation in his father's family. Not one of these is the case here; it is a case *sui generis*. If, therefore, it is to be considered as an emancipation, it must be on some reason or principle. Now, the reason why it should be so considered is said to be this, that the provision made for the child secures to her an independence and maintenance, and to the parish a discharge from all probability of burthen on her account. The statute 3 *W. & M.* enacts, that if any unmarried person, not having child or children, shall be lawfully hired, &c.; which has been construed to mean, that if he has no child that can be a burthen to the parish in consequence of his acquiring a settlement there, he shall be considered as not having a child within the meaning of the statute. But was that the case of this pauper when he hired himself? The property devised was merely in trust for the use and benefit of the grandmother, in the first instance, with a direction to her, certainly amounting in equity to an obligation to maintain the child, and after the grandmother's death to the child. But this trust might have failed; the trustees might have violated it and not paid the interest to the grandmother, or she might have proved unfaithful to her trust and refused or neglected to maintain the child; in which events, so long at least as they continued, the child must have resorted to her father for maintenance, who was not discharged by any emancipation of the child from the parental obligation of providing for her maintenance. It seems to me, therefore, under these circumstances, that the father was not in the situation of a person not having a child within

the

the meaning of the statute; because he had a child, who would have a right to share with him, if he should be unable to provide one, a maintenance from the parish where he should become settled, and who consequently might be a burthen to the parish. He was a person having a child, who might, in the eventual failure of the funds bequeathed for her support, claim a provision from him, and he again might have claimed to have the control and custody of her at any time. The case has certainly been ingeniously argued; but I think it does not amount to an emancipation either to discharge the rights of the one or the duties of the other.

BAYLEY J. I am of the same opinion. The rule is, that the child's settlement shall shift with that of the father until the child is emancipated. This is a perfectly new case, and different from all the other cases of emancipation. A provision is made by the will of the grandfather for the maintenance and education of the child, who is living with her grandmother, apart from her father's family; and the question is, if such a provision can be said to deprive the parent of his rights over his child, to resume to himself the care and custody of her, or can relieve him from the duty of maintaining her. If this case amounts to an emancipation, would it not be the same, under the like circumstances, at whatever age the child might be? For the law makes no distinction in respect of the different ages of infants under twenty-one, at which time the parental authority ceases, and the father has no right to reclaim his child. Let us then put the case of an infant of very tender years, for whose maintenance the grandfather should make a provision by his will; could it be contended that such a provision would preclude the father from insisting upon having

his

1816.

The King *against* The Inhabitants of Uckfield.

his child returned to him? I think that could hardly be contended. But, to come nearer to the present case: suppose, after the year's service of the father, the child then being of the age of nineteen, had returned to the roof of her father, the father having then acquired a new settlement by such service, can there be a doubt that the child would have taken that settlement; and yet, if she was once emancipated, she could not, because she would be emancipated for ever. If, then, she would have been entitled to the father's subsequent settlement, that shews that the separate provision made for her by her grandfather's will could not operate as an emancipation. I therefore think, that as she was not emancipated, but, notwithstanding the separate provision made for her, continued part of her father's family, and capable of deriving from her father any settlement which he might acquire, she was a child who might become chargeable to the parish in consequence of his acquiring a settlement. If so, it follows that the father was not in the situation of a person who is capable of acquiring a settlement by hiring and service; that is, a person not having a child within the meaning of the statute.

Holroyd J. (*a*) I concur in opinion with the rest of the Court. The maintenance provided for the child by the will was precarious, and the obligation of the father to maintain her still continued. The father's control over the child also continued; and therefore, there is no ground upon the cases, or upon principle, to hold that the child was emancipated. I therefore think that the father was not in a situation to acquire a settlement by hiring and service.

Order confirmed.

(*a*) *Abbott* J. was absent upon the special commission.

The KING *against* BELL.

Wednesday, June 19th.

The lessee of market tolls in gross not incident to the soil, is not rateable to the poor in respect of his occupancy thereof.

UPON appeal by *Bell* to the Quarter Sessions for the county of *Cumberland*, against a rate made for the relief of the poor of the township of *Cockermouth*, the Sessions confirmed the rate, subject to the opinion of this Court upon the following case:

The Earl of *Egremont* is lord of the manor of *Cockermouth*, and owner of the soil of the streets of the town of *Cockermouth*. He, or his lessees, have from time immemorial collected and received certain tolls of corn sold in the market; the toll has, however, been hitherto collected at the commencement of the market out of every sack brought and exposed for sale. The Earl, or his lessees, also receive payments for stallage there from persons using stalls, and exposing upon them such things for sale as are usually sold on stalls; and the Earl, or his lessees, take the sweepings of the streets. The market is a market by prescription, and is holden in the public street and highway in the town of *Cockermouth*, where the sacks of corn are set down for sale, and the tolls are there taken. The tolls of corn are a handful out of each sack; *Bell* is the present lessee of them, and pays a yearly rent of 50*l.* to the Earl, and as such lessee takes the tolls of corn in the market; but he is not an inhabitant of the township of *Cockermouth*, nor possessed of any property within it, except these tolls; the tolls yield an annual profit. *Bell* is rated in the assessment for the relief of the poor of *Cockermouth* as follows:

" *David Bell*, corn tolls - - - 15*s.*"

He is not lessee of the stallage, nor of the sweepings of the

1816.

The King against Bell.

the market, which are rented by other persons, who are severally rated for them to the relief of the poor in the same rate. The question is, whether *Bell* is rateable in respect of these tolls.

P. Courtenay, in support of the order of Sessions, contended that *Bell* was rateable as occupier of the soil of the market; not, indeed, as having the entire occupancy, but as occupying it by a partial pernancy of the profits, which is enough. (*a*) These tolls are in the nature of stallage or pickage; for the setting down sacks in the market is an user of the soil, of the same nature, if not to the same extent, as pitching a stall; and it has been adjudged, that although every man has of common right liberty to come into a public market for the purpose of buying and selling, yet has he not of common right liberty to place a stall there, and trespass may be maintained for it by the owner of the soil. (*b*)

Lord Ellenborough C. J. I cannot say, upon this statement, that the appellant is an occupier of land. Would he not be equally entitled to the toll, although the sacks were not set down in the market, but were upheld on the shoulders of those who exposed the corn to sale? There is nothing to give this toll a corporeal quality.

Bayley J. *Bell* is assessed in the rate for corn tolls, which it is plain from the statement of the case were mere market tolls, and not incident to the soil. In *Heddey* v. *Welhouse* (*c*) the distinction is well taken; for it is said,

(*a*) *Rex* v. *Baptist Mill Company, ante*, 1 vol. 612.

(*b*) *Mayor of Northampton* v. *Ward*, 2 *Str.* 1238. *Mayor of Norwich* v. *Swann*, 2 *Bl. R.* 1116.

(*c*) *Moor*, 474. cited in 2 *Str.* 1239.

if

if the king grant a fair or market with toll certain to one and his heirs, to be holden in land, which is borough-English, and the grantee die, the heir at the common law shall have the market and the toll; but the younger son shall have the stallage and pickage, with the soil, by the custom.

1816.

The King

HOLROYD J. (a) These tolls would be equally payable, if the soil had belonged to another.

G. *Lamb* was to have argued against the order of Sessions.

Order quashed.

(a) *Abbott* J. was absent on the special commission.

MATSON *against* BOOTH.

Thursday, June 20th.

A sheriff is bound to let his prisoner arrested upon mesne process at large, upon reasonable sureties, and a bond with five sureties, three of whom are respectively worth more than the penalty of the bond, is sufficient, though the other two are worth less than the penalty. The addition of another obligor after the bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligors, does not vacate the bond or make a new stamp necessary.

CASE. The plaintiff declares that one *G. S.*, on the 14th *July* 1815, sued out a capias ad respondend., directed to the sheriff of *Huntingdon*, against the plaintiff, returnable on the morrow of *All Souls*, indorsed for bail for 1108*l*., which writ, on the 15th *July*, was delivered to the defendant, then sheriff of the said county; by virtue of which the defendant arrested the plaintiff, and detained him in custody until he tendered to defendant, on the 20th *September*, reasonable sureties of sufficient persons, to wit, *G. Farey*, *T. Normington*, *E. Holder*, *W. Martin*, and *T. E. Fisher*, the same being then and there responsible and sufficient persons, *and having and each of them having sufficient within the county*, and who were willing and offered to become bail for the appearance of the plaintiff at the return of the writ. Yet the defendant, not regarding his duty

1816.

MATSON *against* BOOTH.

as sheriff, &c. refused to accept the sureties, and detained the plaintiff in custody, under colour of the said writ, until the 29th *September*, contrary to the form of the statute; by means whereof the plaintiff was detained in prison an unreasonable time, and during that time suffered in body and mind, and was prevented from transacting his affairs, and injured in his credit, and hath also incurred the risk of being proceeded against as a bankrupt. Plea not guilty.

At the trial before *Wood* B. at the last assizes for *Huntingdon*, the case was thus: the plaintiff was arrested on the 15th of *July*, and continued under that arrest until the 20th *September* following, on which day his attorney made application to the under-sheriff's brother, then acting for the under-sheriff in his absence, for the plaintiff's discharge, and tendered a joint and several bond, executed by the plaintiff and the first four sureties named in the declaration, with a blank for another obligor, and made to the defendant as sheriff, in double the amount of the sum sworn to, conditioned for the plaintiff's appearance in the said action, and attested by two witnesses, one being of the name of *T. E. Fisher*, who tendered the bond, and asked the under-sheriff's brother if he were satisfied with the sureties, adding, that if it was desired he (*Fisher*) would also execute it; to which proposal the under-sheriff's brother assenting, *Fisher* executed the bond, the other obligors not being then present. Three of the sureties were proved to be severally worth more than the amount of the penalty of the bond, the other two to be worth a sum under the amount of the sum sworn to. After *Fisher* had executed the bond, the under-sheriff's brother went to the office, and on his return told *Fisher* that his brother had left orders that he would take no

bail,

1816.

MAISON *against* HOMAN.

bail, and then laid the bond on the table and left it. On the 29th of the same month the bond was again tendered and accepted, and the plaintiff was liberated. It was objected at the trial, that the security tendered to the sheriff was insufficient, because the adding another obligor after the bond was executed, without the privity of the former obligors, was an alteration material to avoid the bond; and also because this addition rendered a new stamp necessary. It was further objected, that each surety ought to have sufficient to cover the amount of the debt for which he became surety; and accordingly the plaintiff has averred in his declaration, "that they were responsible persons, having and each of them having sufficient within the county." These objections were over-ruled; the learned Judge observing as to the latter, that the statute (*a*) neither prescribed any particular number of sureties, nor that each should be worth any particular sum, the words being general, "reasonable sureties of sufficient persons having sufficient within the county." The jury found for the plaintiff, damages 40*l*.

Blosset Serjt. obtained a rule nisi in the last term for a new trial, renewing these objections:

And the rule now coming on, *Blosset* Serjt. and *Stocks* were heard in support of it; and, as to the first point, they distinguished this case from *Zouch* v. *Clay* (*b*); because in that case, according to the report in *Levinz*, the addition was made with the consent of all parties. The same distinction was taken in *Marckham* v. *Gonaston*. (*c*)

(*a*) 23 *H*. 6. c. 9.
(*b*) 1 *Vent*. 185. 2 *Keb*. 872. 881. 2 *Lev*. 3[illegible]
(*c*) *Moor* 5[illegible] *Cro*. *Eliz*. 626.

1816.

Maison *against* Booth

And as to the necessity of a fresh stamp, they argued that the bond, by the insertion of *Fisher's* name, became a new and different instrument, for it was complete as it stood before; consequently it required a new stamp. Lastly, the obligation being joint and several, each may be sued severally, and has bound himself to the whole amount, and therefore each ought to have a sufficiency to that amount; and this the plaintiff has undertaken by his averment to prove, which is a material averment, and cannot be struck out.

Bayley J. (*a*) With respect to the objection upon the stamp, I am not aware of any case like the present, in which it has been holden that a new stamp is necessary. If a bill be altered while it is still in the drawer's hands, before it gets into circulation and is accepted, it has never been considered that a new stamp was requisite; otherwise, if it has been accepted, for then it has become a complete bill. Now here the bond was never out of the hands of the obligor; it remained with his agent, and never passed to the obligee. As my Lord has remarked, all was *in fieri*, the bond was in the nature of an escrow only. Upon the other points, also, I think that this application fails. When the bond was originally tendered to the sheriff, and he refused it, it seems to me that it was free from objection; and that the addition of *Fisher's* name to it did not vacate the bond. The addition was made with the concurrence of the agent of the obligors at a time when the bond could be considered no otherwise than as in the nature of an escrow; and, being made with the concurrence of the

(*a*) Lord *Ellenborough* C. J. left the Court during the argument.

1816.

MATSON *against* BOOTH

agent of the obligors, it is the same as if it had been with their concurrence, which brings the case within the authority of *Zouch* v. *Clay*. As to the objection, upon the insufficiency of some of the sureties individually, it seems to me that both the language and meaning of the statute have been satisfied. Three of the sureties were worth more than the penalty of the bond, that is, double the amount of the sum sworn to: the addition of two other obligors certainly ought not to have the effect of vacating this bond.

HOLROYD J. (*a*) I am of the same opinion; and think this rule ought to be discharged. When the bond was tendered it was an available security with sufficient sureties, and the addition of the other obligor was by the consent of all parties. Nor is it necessary that each should be worth the whole amount, where there is a sufficient number of that description. Suppose the defendant, instead of the general issue, had pleaded that each was not worth the full amount, would not such a plea have been demurrable? I apprehend it would. I therefore think that this rule for a new trial should be discharged.

Rule discharged.

(*a*) *Abbott* J. was absent on the special commission.

1816.

Friday, Jun 21st

Robinson and Others, Assignees of Clarkson and Parker, Bankrupts, *against* Macdonnell and Others, Assignees of G. Sharp, W. Sharp, and G. Sharp the Younger.

An assignment of the freight, earnings, and profits of a ship, does not extend to profits not in existence actual or potential, at the time of the assignment, therefore where *C.* assigned by deed to *S.* the freight, earnings, and profits of the ship *W.*, which ship afterwards, in a voyage to the *South Seas*, obtained a quantity of oil, the produce of whales taken in the said voyage. Held, that this oil did not pass to *S.* by the assignment; for the assignor had no property, actual or potential, in the oil, at the time of assignment, and the voyage was not then contemplated.

The statutes 26 *G.* 3. c. 60. and 34 *G.* 3. c. 68. do not enure to prevent the operation of the stat. 21 *Jac.* 1. c. 19. s. 11., upon *British* registered ships, therefore, where *C.*, being owner of a ship, conveyed the same to *S.*, but by the consent of *S.* continued to have the order and disposition, until he became bankrupt. Held, that the property passed to the assignees of *C.*, though the transfer was complete under the register acts.

A deed executed and indorsed on a former deed, as a further security for advances made and to be made under the first deed, is exempted by 48 *G.* 3. c. 149. from an *ad valorem* duty, if the first deed be stamped with an *ad valorem* stamp.

A bill of sale of a ship is not void, though it omit to set forth the true consideration, and is not stamped with an *ad valorem* stamp, but the parties thereto are liable to a penalty.

TROVER for the ship *Warre* and 500 tons of oil. Plea, general issue. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after *Michaelmas* term, 1814, there was a verdict for the plaintiffs as to the ship, and for the defendants as to the oil, subject to the opinion of the Court on the following case:

The ship *Warre* being the property of *Robinson*, *Clarkson*, and *Parker*, (though registered only in the names of *Clarkson* and *Parker*,) was chartered by them to the transport-board, and continued in this service until the end of the year 1811, when she was discharged. She was then fitted out by the same owners for the whale-fishery in the *South Seas*. All the orders for the different parts of the outfit were given by them, and the bills of the the tradesmen employed in the outfit were entitled "Captain *Kenney* and Owners of Ship *Warre*," and were sent in to them, and some of

th.

the bills were paid by them. The captain was also appointed and employed by them, and all ordinary acts of ownership were exercised by them. The ship sailed upon this adventure for the *South Seas* on the 12th of *May*, 1812. For some time before this, Messrs *Sharps* had been in the course of advancing large sums to the house of *Robinson, Clarkson*, and *Parker*, by means of bills of exchange, the repayment of which had been secured to the Messrs. *Sharps* at different times, by several deeds, as hereafter mentioned; and this adventure to the *South Seas* becoming a subject of discussion between the two houses, it was stated to the Messrs. *Sharps*, and consented to by them, that the proceeds of the adventure should be applied in liquidation of the advances made by them; and these advances were continued to be made at different times down to the period of the bankruptcy of the two houses, at which time there was a debt due from *Robinson, Clarkson*, and *Parker* to the *Sharps*, exceeding the value of the ship and cargo. The following deeds were from time to time made to secure to the *Sharps* the repayment of their advances. By the first, dated 10th of *May*, 1810, reciting that *Robinson, Clarkson*, and *Parker* had requested the *Sharps* to lend them divers sums of money, which they had agreed to do on having repayment thereof with interest secured by an assignment of five ships mentioned in the deed, their freight and earnings; and that the said five ships had been assigned to the *Sharps* by five bills of sale, of the same date, *Robinson, Clarkson*, and *Parker* assigned to the *Sharps* and their assignees all the freight and earnings then due, or thereafter to become due, and the benefit of all contracts for the hire of the said ships, subject to a proviso for reconveyance of the said ships, &c. if *Robinson, Clarkson*, and

1816.

ROBINSON *against* MACDONNELL.

and *Parker* should, within two months after request in writing, pay to the *Sharps* all sums of money which they had or might thereafter have advanced. By another indenture, (12th of *November*, 1810,) between *Robinson*, *Clarkson*, and *Parker* of the first part, *Charles East Walkden* of the second, and the *Sharps* of the third, reciting the deed of the 10th *May*, 1810, and that *Robinson*, *Clarkson*, and *Parker* were the sole owners of the ship *Crisis*, and were owners, together with *Walkden*, of the ship *Southampton*; and also that *Walkden* was sole owner of the ship *Anne*; and that it had been agreed that these three ships, freight, earnings, and policies of insurance, should be assigned to the *Sharps* as a further security for the sums of money secured or intended to be secured by the first-mentioned indenture; and that in pursuance of the said agreement, the said three ships had been transferred to the *Sharps* by three bills of sale under the hands and seals of *Robinson*, *Clarkson*, and *Parker*, and by a bill of sale under the hand and seal of *Walkden*; *Robinson*, *Clarkson*, and *Parker*, and *Walkden*, assigned to the *Sharps* all the freight, earnings, profits, &c. of the said three ships, with a proviso that the *Sharps* should stand possessed of the said ships, freight, and earnings, &c. subject to the same provisoes, &c. as in the first-mentioned indenture. Both these deeds were stamped with a stamp of 20*l*. On the latter was indorsed another deed, bearing date the 15th *December*, 1810, stamped with a stamp of 1*l*. 10*s*., and made between *Robinson*, *Clarkson*, and *Parker*, of the one part, and the *Sharps* of the other; whereby, reciting that *Robinson*, *Clarkson*, and *Parker* were the sole owners of the ship *Warce*, and the freight and earnings thereof; and that they, as a further security to the *Sharps* for all

such

1816.

ROBINSON against MACDONNELL.

such sums of money as by the said indenture of the 12th *November* were expressed to be secured, had agreed to assign to the *Sharps* and their assigns the freight, earnings, &c. of the ship *Warre*; *Robinson*, *Clarkson*, and *Parker* assigned to the *Sharps*, their executors, administrators, and assigns, all the freight, earnings, profits, and sum and sums of money then due, or which might thereafter become due on account of the said ship, and the benefit of all agreements for the hire of the said ship, and all the right, title, and interest of *Robinson*, *Clarkson*, and *Parker*, any or either of them, to the said several premises; with a proviso that the *Sharps* and their assigns should stand possessed of the said freight, &c. upon the same trusts, &c. and subject to the same powers, &c. as declared in the indenture of the 10th *May*, 1810. The ship *Warre* was conveyed by bill of sale bearing date *July* 4th, 1811, stamped with a stamp 1*l.* 10*s.*, and purporting to be made for a consideration of 10*s.* between *Robinson*, *Clarkson*, and *Parker* of the one part, and the *Sharps* of the other part. The advances by the latter to the former were the consideration of this deed, for which advances it was executed as a security. The *Sharps* resided in *London* as well as *Robinson*, *Clarkson*, and *Parker*, but *Parker* formerly resided at *Hull*, to which port the *Warre* originally belonged, and was there registered; and as she was at sea at the time of the execution of the bill of sale, a copy of it was, on the 8th of *July*, 1811, delivered to the proper officer of the customs at *Hull*, and duly recorded there, pursuant to the statutes for the registration of *British* ships; and on the 9th of *May*, 1812, the *Warre* being then in the port of *London*, the *Hull* certificate of registry was delivered up to be cancelled, and she was

1816.

ROBINSON against MACDONNELL.

registered *de novo* in the port of *London*, in the names of the *Sharps*, and a certificate of such registry was obtained, with which certificate she sailed on her voyage to the *South Seas*. The said ship did not return to *Hull*, nor was any indorsement of the transfer to the *Sharps* ever made on the *Hull* certificate of registry. The oil in question was obtained in the whale-fishery upon the voyage above mentioned. The case stated a conversion by the defendants, and that the *Sharps* became bankrupts on the 1st of *October*, 1812, and *Robinson*, *Clarkson*, and *Parker* on the 30th of *January*, 1813, and that the ship *Warre* arrived with the oil in question from the *South Seas* in *December*, 1813. The question for the opinion of the Court was whether the plaintiffs were entitled to recover the ship and oil, or either of them.

This case was argued at *Serjeants' Inn*, before *Easter* term, by *Taddy* for the plaintiffs, and *Richardson* for the defendants. For the plaintiffs it was argued, first, that the deed of the 15th *December*, endorsed upon that of 12th *November*, 1810, was not properly stamped, not being within the exemption in stat. 48 *G.* 3. *c.* 149. sched. part 1. title, Mortgage. Exemptions, "*Any deed &c. made as an additional or further security for any sum or sums of money, &c. already secured by any deed, which shall have paid the* ad valorem *duty.*" For by this exemption was meant only an additional security for one and the same sum or sums of money then advanced, but not where it is to extend to advances *in futuro*, or to a kind of floating advance. Secondly, The bill of sale, 4th *July*, 1811, was not properly stamped, this being a sale which required an *ad valorem* stamp; and in all such cases the act (s. 22.) directs that "*the full purchase or consideration money, which shall be directly or indirectly*

paid

1816.

ROBINSON *against* MACDONNELL.

paid or secured, &c. shall be truly expressed and set forth." Wherefore, for want of this, the bill of sale is void, and the parties have also, by *s.* 22., incurred a penalty, which is cumulative. Thirdly, The defendants are not entitled to the oil under the deed of the 15th *December*; for nothing passes by this deed but that which may properly be denominated either "freight, earnings, profits, or sum of money due on account of the ship;" whereas this oil, being the produce of the whales taken in the *South Seas*, and acquired by the art and industry of man, cannot in any way be set down to the account of the ship. Fourthly, The plaintiffs are entitled, as being the assignees of those, who, at the time of their bankruptcy, were the reputed owners, within stat. 21 *Jac.* 1. *c.* 19. *s.* 11., of this ship and cargo. The statute is highly remedial, and looks to the apparent ownership, by means of which persons are enabled to acquire credit with the world. It extends alike to ships (*a*), as to other property; and this, as well since the register acts as before. For the register acts (*b*) were not intended to restrain the operation of the bankrupt laws, those laws not being mentioned in them, and the object of registration being *alio intuitu*. The object of registration was to provide a security that ships navigated as *British* should be really *British* owned; and it is with this object, and not with that of showing to the world who the particular owner or owners are, that every transfer is directed to be registered. It is true that the effect of this provision is to make the legal interest, as between parties to any transfer, no longer dependent upon the apparent change of possession, but lying in certainty in the registered docu-

(*a*) *Stephens* v. *Sole*, cited 1 *Ves.* 352. *Hall* v. *Gurney*, *Co. Bank. L.*, *c.* 8. *s.* 11. *Ex parte Batson*, *ib.* *Ex parte Matthews*, 2 *Ves.* 272. *Atkinson* v. *Maling*, 2 *T. R.* 462.

(*b*) 26 *Geo.* 3. *c.* 60. 54 *Geo.* 3. *c.* 68.

1816.

ROBINSON *against* MACDONNELL.

documents of the ship's transfer, in default of which the mere possession confers no title. But on the other hand it is reasonable to hold that as these acts do not provide for making public the registered documents of the several transfers, for the registers are not accessible to the public, so they shall not work a prejudice to the rights of third persons who are strangers to these transfers, when those rights intervene, by operation of law, as arising out of the apparent and visible ownership of property.

In the course of the above argument, the Court intimitated their opinion upon the first point, that the indorsed deed of the 15th *December* was, in effect, no more than an additional security for the same sum, that is, the same amount as secured by the former deed; and as to the second point, that the default of setting forth the true consideration and want of proper stamp, though they subjected the parties to a penalty, did not avoid the bill of sale.

For the defendant it was argued, as to the third point, that the oil passed by the assignment (15th *December*) of the ship's freight, earnings, &c. such assignment not being within the provisions of the register acts; *Abbott* on shipping, *P.* 1. *c.* 2. *s.* 50, 51., and *Mestaer* v. *Gillespie*. (*a*) Upon the last point it was urged that since the register acts the stat. 21 *Jac. c.* 14. *ss.* 10, 11. did not apply to the case of *British* registered ships. Although the words of the statute of *Jac.* are general, "any goods or chattels," they are not always to be taken in their most extensive signification; for instance, they do not extend to leasehold interests in land (*b*), yet

(*a*) 11 *Ves.* 621.

(*b*) *Ryall* v. *Rolle*, 1 *Atk.* 165. *Horn* v. *Baker*, 9 *East*, 215.

these

1816.

ROBINSON *against* MACDONNELL.

these are clearly chattels; and the reason is, because in such things the inference of property does not arise out of the mere possession, but he who would assure himself of the title ought to resort to the title-deeds. The case is still stronger with respect to ships, because as to them a public register is now established, to which all mankind may resort for the purpose of ascertaining the title, and that public register must decide among all mankind where the property is. The registry is the evidence of the property. (*a*)

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. On the argument of this case several questions were made. Those which arose upon the stamp act we disposed of in the course of the argument, and to which there is no occasion at present to refer. The defendants' claim to the ship arises from the bill of sale only, but their claim to the oil is founded also upon the deed of 15th *December*, 1810, which is an assignment of the freight, earnings, profits, &c. of that ship. If that deed is to be confined to the freight and earnings under the then subsisting charter-party, it would not extend to the oil in question, because that is the produce of a subsequent voyage; and if that deed is to extend to all freight, earnings, and profits in subsequent voyages, it is open to the objection made by the Lord Chancellor in *Speldt* v. *Lechmere*, that it will for ever separate the ship and earnings; or, if that deed were to be considered as an assignment of the ship itself, as a devise of the rents and profits is a devise of

(*a*) *Curtis* v. *Perry*, 6 *Ves.* 739. *Ex parte Yallop*, 15 *Ves.* 60.

the

1816.

ROBINSON *against* MACDONNELL.

the land itself, it would be void under the register act, because it does not recite the certificate of the ship's registry. There is still another objection, however, to the claim of the oil under the deed of 15th *December*, 1810, which is this, that the oil had no existence, actual or potential, at the time this deed was made; and to make a grant or assignment valid, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment; and upon this principle, an assignment of sheep which a lessee was to deliver to the assignor at the end of the lessee's term, or of the wool which should grow upon such sheep as the assignor should thereafter buy, have been held inoperative, because the assignor had not, at the time of the assignment, that which he was professing to assign, either actually or potentially, but in possibility only. *Wood* and *Foster*'s case, 1 *Leon.* 42. and *Grantham* v. *Hawley*, *Hob.* 132. Now here, at the time of this assignment, *Clarkson* and *Parker* had no property, actual or potential, in this oil: it was altogether matter of chance whether any of it would have been obtained; and even the voyage in which it was obtained does not appear to have been in contemplation. For these reasons, we think the defendants have no claim under the deed of 15th *December*, 1810. The only remaining question is, whether they have any claim under the bill of sale. The bill of sale was in *July*, 1811, when the ship was at sea, but upon her arrival in the port of *London* at the latter end of that year, possession was not taken by the *Sharps*, nor was any act done by them till the 9th *May*, 1812, when the *Hull* certificate of registry was delivered up, and the ship was registered *de novo* in the *Sharps'* names in the port of *London*. Whether the new certificate of registry was

 deli-

1816.

ROBINSON against MACDONNELL

delivered to the captain before the instant of her sailing, which she did on the 12th *May*, 1812, does not appear; but although the employment of the vessel was the subject of private communication and discussion between *Robinson*, *Clarkson*, and *Parker* and the *Sharps*, yet the ship was fitted out, and the captain appointed and employed by *Robinson*, *Clarkson*, and *Parker*: every article of the outfit was obtained upon their credit, and all the ordinary acts of ownership were exercised by them. There was therefore, as in the case of the *Dyer's Plant*, a continuance of the old ownership; and the question is, whether the appearance of that ownership will bring the case within the statute of 21 *Jac.* 1. *c.* 19. That ships were within that statute before the register act of 26 *G.* 3., though the statute 7 and 8 *W.* 3. *c.* 22. in many cases required their registration, is clear from the authorities cited in the argument of *Ex parte Matthews*, *Hall* v. *Gurney*, *Atkinson* v. *Maling*, *Ex parte Batson*, and *Stephens* v. *Sole*, and was indeed conceded upon the argument; but the point relied upon was, that the register acts of 26 and 31 *G.* 3. had changed the law in that respect, and that since those acts no visible ownership in a registered ship could give a right under the statute of *James*. It would be matter of regret if, under the circumstances of this case, such were the law, because it seems apparent, that the *Sharps* wilfully postponed the doing any act which might be deemed equivalent to taking possession, until the expence of outfit for the intended voyage, which was considerable, had been incurred under the orders and upon the credit of Messrs. *Clarkson* and Co. They were desirous that the property should be legally, but secretly, their own, and should appear to belong to others, in order that they might

1816.

Robinson *against* Macdonnell.

might in the end reap the benefit of that credit which the apparent ownership would enable those others to obtain without pledging their own credit or responsibility in any degree; so that this is a case most plainly within all the mischief intended to be remedied by the statute of *James*, and is one of the strongest cases that has arisen upon that statute. We think, however, that the register acts of 26 and 34 *G.* 3. do not repeal the statute of *James*. It cannot be contended that they do so expressly: they were passed for purposes of public policy, to confine to *British* subjects and to *British* built ships the benefit of *British* trade. They were not introduced with any view to the convenience of individuals, or to give notoriety to this species of property, and to the conveyances affecting it; but the notoriety, as far as there is any, is a consequence of the measures adopted to effect the policy of the state. The statutes contain no provisions for enabling persons to search the registers and ascertain titles; and it would be very difficult to show that any individual, who may wish to obtain such information as the books at the custom-house will afford, has a right to do so, and can compel the officers to submit them to his inspection. And if this cannot be shown, then the statutes cannot have the effect which the defendants wish to attribute to them, because no argument can be adduced against persons from the existence of documents which they have no right to see. But, supposing the right of general inspection to exist, it will by no means follow that persons are bound to have recourse to it. Shall a man who supplies a ship in the port of *London*, upon the orders and credit of one who appears and acts in that place as owner, be told by those who suffered him so to appear and act, that if he had sent

to

1816.

ROBINSON *against* MACDONNELL.

to *Hull* he might have learnt that this appearance was delusive, and that, in point of law, the property was vested in them? We think such an argument devoid of reason and justice. Then is there any thing in these statutes which prevents the plaintiffs from asserting their claim? The measures adopted for effecting the object of public policy are such, that every person claiming title through the medium of a conveyance as *the act of parties*, must show a conveyance of the form and character prescribed by these statutes. The plaintiffs did show an original title in the bankrupts whom they represent, grounded upon such conveyances. Has that title been divested, as against them, they being the representatives also of the general body of creditors, by any other conveyance? It is admitted that deeds alone, in the case of an unregistered ship, would not have that effect, and we think the registration and new certificate cannot produce it. These statutes do not affect titles passing by operation of law, as to executors or administrators, in case of death, or to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by the statutes; and if a title may be transmitted without these forms in the case of bankruptcy generally, we see no reason why it may not be so done in a particular case falling within the scope and object of the statute of *James*, though those forms have been complied with in a conveyance to others, *i. e.* the *Sharps*; such conveyance being fraught with all the mischief which that statute was made to prevent. The register acts make certain forms necessary to the validity of transfers and conveyances, which antecedently would have been good and valid without them, but it was never intended by the legislature that a compliance with

these

1816.

ROBINSON *against* MACDONNELL.

these forms should give validity to a transfer and conveyance, which antecedently would have been bad and invalid; and we think such an effect ought not to be attributed to them. Considering this, then, as a case in which a title, in compliance with the forms which the register acts require, was once duly vested in the bankrupts, and that the conveyance by the bankrupts was void as against the plaintiffs, under the statute of *James*, we are of opinion that there must be judgment for the plaintiffs both for the ship and for the oil.

Friday, June 21st.

ATKINSON and Another *against* FELL and Another.

A valuation made of the parish lands by two resident parishioners, appointed for that purpose at a parish meeting by the parish officers, with a view of equalizing the rate to the relief of the poor, was held not to require an appraisement stamp, it being merely for the information of the parties employing the valuers.

ASSUMPSIT for work and labour in surveying and valuing lands, &c. Plea, non assumpsit. At the trial before *Le Blanc* J. at the last *Lancaster* assizes, the case was thus: the plaintiffs, one of whom was a farmer residing on his own estate, the other a basket-maker also residing on a small property of his own, were appointed at a meeting of the parish of *Colton*, by the defendants, who were two of the sidesmen of the parish, to value the parish lands, with a view of equalizing the parish assessments to the relief of the poor. Having made their valuation, they reduced it into writing, and delivered it to the defendants; and the question was, whether this valuation ought to be stamped. The point having been reserved at the trial, and a verdict found for the plaintiffs, a rule nisi was obtained in the last term, for entering a nonsuit.

Scarlett,

1816.

ATKINSON *against* FELL.

Scarlett, (*Richardson* with him,) who now shewed cause, contended, that this valuation did not require a stamp. And he referred to the stat. 46 *Geo.* 3. *c.* 43. and argued that the words "any valuation or appraisement," though general, ought to be restrained to such valuation or appraisement as is the proper business of a sworn appraiser or person required by the act to take out a licence.

J. Williams and *Parke*, contra, argued that this case fell within the schedule imposing a duty upon "appraisements or valuations of any estate or interest therein, or of any dilapidations or repairs," &c. and farther, that the 11th section, having expressly exempted "appraisements made in pursuance of an order of the Court of Admiralty," and that the 48 *G.* 3. *c.* 149. *Sched. Part* 1. 55 *G.* 3. *c.* 184. *Sched. Part* 1. which are *in pari materiâ*, having also made similar exemptions, with a further exemption of "appraisements made for the purpose of ascertaining the legacy-duties," it followed, according to the maxim, "*expressio unius est exclusio alterius*," that all other cases, not specifically named, were intended to be made subject to the duty.

Lord ELLENBOROUGH C. J. The statute 46 *G.* 3. *s.* 4. enacts, "That every person who shall appraise any estate, real or personal, in expectation of any hire or reward, shall be deemed to be an appraiser within that act." Now if these words are to be construed literally, the consequence will be that every person who, in one single instance only, shall happen to make a valuation, must, without regard to circumstances, be subject to the appraiser's duty. But I think the act of

 par-

1816.

ATKINSON *against* FELL.

parliament is not to be so construed; but that, according to its true spirit and intention, the term "appraiser" is meant to designate a person who bears the known character of an appraiser; and, accordingly, we find the 5th section speaks of the *calling* or occupation of an appraiser. Such a person is, by the act, obliged to take out a licence annually, and a valuation made by him in the way of his calling is subject to a duty. Now these plaintiffs were not appraisers in any sense of the word, but the one a farmer, the other a tradesman, resident on their own property; and being, from their situation in life, no doubt, acquainted with agricultural matters, were applied to by the parish officers to contribute their aid in valuing the parish lands, with a view of equalizing the parish rates. There is hardly a farmer in the kingdom who will not be obliged to take out a licence if these plaintiffs must. If the case alluded to of an appraisement relative to the legacy duty had been merely to guide the party in making probate, I should have thought it would have furnished a strong instance, in the present case. But it must be remembered, that the valuer there is as between the executor or administrator and the commissioners *quasi* an appraiser, whose appraisement is not to be for the bare information of his employer, but is to serve as a document before the commissioners. The exemption of appraisements under the order of the Court of Admiralty appears to me to afford no argument in favour of the construction contended for by the defendants, because such appraisements would clearly have fallen within the act, had they not been specially exempted. And, with respect to the general words, "appraisements of any dilapidations or repairs,"

1816.

ATKINSON *against* FELL.

repairs," they are to be considered as furnishing evidence between the parties, and not for the private information of one only. But in this case the churchwardens and those who employed the plaintiffs did it not in the exercise of any public duty, but only with a view of guiding their own judgment. The valuation was not obligatory upon the parties interested, nor was it in itself extrinsically evidence between them, although it might possibly become so. It appears to me, therefore, that a stamp was not necessary.

BAYLEY J. I am of the same opinion. The distinction which has been laid down appears to me to be correct; for, I think, the words "valuation or appraisement" do not extend to such as are made merely for the private information of parties, but to such only as are intended to be binding between them. If this were otherwise, it would follow that if an action should be depending concerning the value of any estate, and one of the parties, in order to ascertain its value, were to employ and pay a person to look over the property and give his judgment upon that point, the result of this person's judgment must not only be reduced into writing and stamped, but he himself must be obliged to take out a licence.

HOLROYD J. (a) I am also of the same opinion. Considering the act of parliament, I think that it does not extend to valuations made merely for the information of the individual, but that such only from which a right of action or some certain benefit may accrue to the party were in the contemplation of the legislature. For, otherwise, if a man, for his own personal satis-

(a) *Abbott* J. was absent

1816.

ATKINSON *against* FELL.

faction only, were to employ a person to give him his opinion of the value of any estate, it would be necessary to reduce this into writing and have it stamped. But I believe there is not any authority which makes a stamp necessary in such a case. It is otherwise where a certain benefit is to result, or a right of action, from the valuation. If this required a stamp, then, by the 4th section of the stat. 46 G. 3., the persons making it ought to have had a licence; and, by the 5th section, are liable to a penalty for acting without one, for they have, undoubtedly, made an appraisement within the literal sense of that word, if it be within the meaning of the statute. But I am of opinion that this case is not within the meaning of the statute.

Rule discharged.

Friday, June 21st.

RANDS *against* THOMAS.

Where defendant's name had been registered as part owner of a ship upon the oath of *C.*, and he had afterwards assigned his share to *C.* by bill of sale, in consideration of 5*s.*, and covenanted, that he had a good title: Held, that in an action against defendant for goods furnished to the ship, charging him in respect of his interest only, it was competent to defendant to call *C.* as a witness, to prove that he had inserted defendant's name in the register without his privity or consent, and that the bill of sale was merely to divest him of any supposed title.

IN assumpsit for goods furnished to the ship *Southampton*, and non-assumpsit pleaded, which was tried before *Graham* B. at the last *Winchester* assizes, the plaintiff, in order to charge the defendant as a part-owner, proved that his name was upon the register as part-owner, and also that, after the time when the goods were furnished, he had executed a bill of sale of the share which by the register he appeared to be entitled to, to one *Cooke*. This was the person upon whose oath the register was obtained, and he was stated in the register to be a part-owner. The consideration

of

1816.

RANDS *against* THOMAS.

of the assignment to *Cooke* was stated to be 5*s.*, and the defendant covenanted that he had a good title. In answer to this case the defendant proposed to call *Cooke* to prove that he had inserted the defendant's name in the register without his privity or consent, and that the bill of sale was merely to divest him of any interest he might be supposed to have under the register. It was objected, that it was not competent to the defendant, who had, by deed referring to the register, acknowledged himself to be a part-owner, to contradict that deed by the parol testimony of *Cooke*; also, that it was not competent to *Cooke* to contradict the oath which he had taken at the time of the registry; and, lastly, that *Cooke* being a party to the bill of sale, could not, by parol, contradict his own deed. The learned Judge rejected the witness, and there was a verdict for the plaintiff.

In the last term a rule nisi was obtained for a new trial, on the ground of this rejection.

Pell Serjt. and *Minchin*, now shewed cause, and argued, as to the general effect of registry, that where a person holds himself out to the world as a part-owner by being registered as such, he shall not be permitted to dispute whether in fact he be so or not; otherwise the register, which is for the very object of ascertaining the real ownership, instead of protecting, would operate as a deception upon the public. But, independently of the register, the defendant has admitted his interest by conveying it away in the most solemn manner known to the law, and by covenanting for a good title; after which it would be highly dangerous to the interests of trade to allow him to aver by parol the

falsity

1816.

RANDS *against* THOMAS.

falsity of his own deed. The same reasons may be urged against the competency of *Cooke* as a witness, with the additional objection, that he would have to falsify his oath as well as his deed. For which reasons, probably, it was ruled in *Nickson* v. *Thomas* (a), that *Cooke's* testimony was inadmissible, although it was proved that where a name has been entered in the register by mistake, it is necessary for the party to convey his interest for the purpose of correcting the mistake.

Lord ELLENBOROUGH C. J. I cannot reconcile to my more mature consideration what was ruled in *Nickson* v. *Thomas*. I can, indeed, well understand that the witness might have taken the objection, that his being compelled to answer the questions might involve him in the penalty of perjury; but this would have been an objection of a different nature, not affecting his competency. I find that it was decided in *Rex* v. *Teal* (b), that a woman who had deposed on oath, at the instigation of the defendant, to the prosecutor's being the father of her bastard child, was a competent witness to prove that in truth the defendant was the father, and, consequently, as it has been objected to-day, to prove herself forsworn; nevertheless this objection undoubtedly went strongly to her credit. Here, it does not appear, whether *Cooke* made oath under persuasion or voluntarily; but supposing it to be the latter, still the objection, I think, only goes to his credit. It seems to me, therefore, that the evidence of *Cooke* was admissible; what would have been its effect, it is not for me to pronounce.

(a) 1 *Starkie, N. P. C.* 85.

(b) 11 *East*, 309.

BAYLEY

1816.

RANDS *against* THOMAS.

BAYLEY J. I think this was an objection only to the credit, and not to the competency of *Cooke*, and it was surely competent to the defendant to prove the real transaction. The plaintiff had not any ground to charge the defendant, except in virtue of his supposed interest in the ship; for the defendant had not done any act to render himself liable. Some months after the goods were furnished, the defendant executed an assignment of a share of the ship, which, as he offered to prove, was never his in point of interest. And, I think, it was competent to him to shew, that the property never belonged to him, and that *Cooke*'s testimony was admissible for that purpose. How far that testimony was to be believed was a question for the jury.

HOLROYD J. (a) I think, on the authority of *Rex* v. *Teal*, that *Cooke* was a competent witness. If the defendant were liable, it was by reason of his being entitled to a share in this ship; for there was nothing otherwise in his conduct to make him liable. But if his liability depended on his title, ought not all the circumstances relative to that fact to be enquired into?

Rule absolute.

Gaselee was in support of the rule.

(a) *Abbott* J. was absent.

1816.

Saturday, June 22d.

The King *against* The Chapelwardens of Milnrow.

Under 53 G. 3. c. 127. s. 7., a party summoned before two justices for non-payment of a church-rate, may give them notice that he disputes the validity of the rate, or his liability to pay the same, although no proceeding is commenced in the ecclesiastical court, and where a party so summoned told the justices that he would bring an action against any person who ventured to levy the rate, as he thought he had no right to pay, because he had no claim to a seat in the chapel: Held, that this was sufficient notice.

UPON appeal against an order of two justices for the county of *Lancaster*, directing the payment of a chapel-rate, the Sessions quashed the order, subject to the opinion of this Court on the following case:

There had been an old chapel at *Milnrow*. In 1796, a new one was built in its stead, in a new situation, three or four hundred yards from the site of the old one. Rates had been made for repairs of the chapel within the last twenty years, and the sums in the present rate were the same as those charged in a former rate. In the year 1815, this chapel was nearly pulled down, and a new one built on the old foundation, and an entirely new gallery erected in it by the chapelwardens. When the chapel was nearly finished, a faculty was obtained, which was for "the repairing and rebuilding of *Milnrow* chapel, and for a new gallery," and a rate was made by the chapelwardens in the vestry of the chapel, in the presence and with the consent of the majority of the inhabitants of the chapelry who attended on the occasion, and signed their names to the rate. *Ralph Bealey* was an inhabitant of the chapelry, and the occupier of a house in it, and was charged by the rate in the sum of 3*l.* 6*s.* 11*d.* in respect of such occupation. On complaint made by one of the chapelwardens of the non-payment of this sum, a warrant was issued to summon *Bealey* before the two justices named in this order, and he appeared accord-

ingly,

1816.

The KING *against* The Chapel-wardens of MILNROW.

ingly. At the hearing before these justices, and in their presence *Bealey* declared that he would bring an action against any person who ventured to levy the rate, as he thought that he had no right (a) to pay, because he had no claim to or seat in the chapel. The justices having made an order upon *Bealey*, directing payment of this rate, *Bealey* appealed to the Sessions, and at the trial of this appeal it appeared to the Sessions, that at the time when the parties were before the two justices, opinions of civilians had been taken for the purpose of trying the question in the ecclesiastical court, but that this circumstance was not stated to the two justices. The Sessions being of opinion, that what *Bealey* stated upon the hearing before the two justices was sufficient notice to them that he disputed his liability to be rated, and, therefore, that their order improperly issued, quashed the same, without deciding on the question of the validity of the rate.

Coltman and *P. Courtenay*, in support of the order of Sessions, contended, that it was not necessary, in order to oust the justices of their summary jurisdiction, given by the 53 *G.* 3. *c.* 127. *s.* 7., that a proceeding should actually be commenced in the ecclesiastical court, but that notice of the party's intention to dispute the rate, although no suit should be then instituted, was sufficient. It is true, that the statute empowers a justice to issue his warrant, "if any one duly rated to a church or chapel rate, the validity whereof has not been questioned in any ecclesiastical court, shall refuse to pay," &c.; so that it might seem, at first sight, as if jurisdiction were given to the justices, except in cases

(a) Sic in orig.

where

1816.

The KING *against* The Chapel-wardens of MILNROW.

where a suit is actually pending in the ecclesiastical court; but this is clearly explained to be otherwise, by the subsequent proviso, "that if the validity of the "rate, or liability of the person from whom it is de-"manded to pay the same, be disputed, and the party "disputing the same give notice thereof to the justices, "the justices shall forbear giving judgment thereupon;" so that now it plainly appears that a justice is restrained from issuing his warant if the rate has been questioned in the ecclesiastical court: but the two justices are likewise restrained from proceeding if the party dispute the validity of the rate, or his liability to pay it, and give notice to the justices. And this construction is mainly confirmed by the statute 7 & 8 *W.* 3. *c.* 6., which is mentioned in this act, and is *in pari materiâ*, and according to which, if the party insist upon his title to be freed from payment of the tithe demanded, the justices are to forbear to give any judgment on the matter. So, in *Rex* v. *Wakefield* (*a*), which was a question upon the stat. 1 *G.* 1., stat. 2. *c.* 6., which extends the 7 & 8 *W.* 3. *c.* 34., Lord *Mansfield* said, the act meant to give the justices jurisdiction, where the real right and title to the tithes should not be in dispute. The question, then, being, whether the validity of the rate or liability of the party was disputed, and whether notice of this was given to the justices, it is only necessary to advert to the facts of the case for a satisfactory answer to this question.

J. Williams, contrà, argued, that the true construction of this act was to give the justices jurisdiction, except where the validity of the rate has been questioned

(*a*) 1 *Burr.* 485.

in

1816.

The KING against The Chapel wardens of MILNROW.

in the ecclesiastical court; otherwise it would be difficult to conceive to what cases the act could be practically applied; for if the mere declaration of a party, that he will not abide by the judgment of the justices, be sufficient to oust them of jurisdiction, the consequence will be, that this act will have been passed for such as choose voluntarily to submit to it, but for no others. And the giving an appeal to any person aggrieved by the judgment of the justices makes it fair to suppose that the legislature contemplated, that as to some matters of right at least, the party might have cause to complain of that judgment. It is reasonable, therefore, with reference to the other provisions, and to the practical effect of this act, to adapt the language of the proviso to that of the enacting clause, so as to produce a conformity of construction; which may be done by construing the words of the proviso, "if the validity of the rate or the liability of the person be disputed," to mean, if they be disputed in the ecclesiastical court. This is not a strained construction, and it will make all parts of the clause agree; but if the proviso, from its generality, should be deemed to run counter to the enacting clause, then it is submitted that, in fair construction, the enacting clause ought to prevail over the proviso; in like manner as, in the case of a deed, an exception is void if it be contradictory to the premises. But supposing the construction to be otherwise, and that it is enough, if the party give notice to the justices, that he disputes the validity of the rate or his liability to pay, it does not appear that any sufficient notice to that effect was given; the language which the party held before the justices being nothing more than what a dissatisfied man might be supposed to use, with-

out

1816.

The King *against* The Chapel-wardens of Milnrow.

out any serious intention of litigating the right. *Rex* v. *Wakefield* is an authority upon this point; for, though it appeared by the affidavits in that case, that the Quakers controverted the title to the tithe, and that the title was in question, nevertheless, because they did not shew any particulars, or upon what ground the payment was controverted, it was held that the justices could not be precluded from jurisdiction, or the order made by them regularly removed into any other court. And it was observed by the Court, that if this should be esteemed a sufficient ground for removing the orders, it would put a total end to the acts of parliament, and evade the very design and intention of making them.

Lord Ellenborough C. J. Before the passing of this statute there was not any remedy by summary application to the justices in the case of non-payment of a church rate; nor was there any provision before the 7 & 8 *W.* 3. for the recovery of small tithes. It was intended by the statute in question, to give a remedy by summary application in the case of a church-rate withheld, but not to invest justices of the peace with a power which belongs exclusively to the ecclesiastical court, that of deciding upon the validity of the rate or the liability of the person to pay it. Those things were expressly excepted out of the operation of the statute. A jurisdiction is created, with certain exceptions; as, first, that the amount shall not be beyond 10*l.*; in the next place, it must be in respect of a matter where the validity of the rate has not been questioned in the ecclesiastical court. These are matters of exception prior to the issuing of a warrant. Unless it be made to appear affirmatively before the justice that the amount

1816.

The King *against* The Chapel-wardens of Milnrow.

is less than 10*l.*, and that no question is made upon the rate in the ecclesiastical court, the justice would not have jurisdiction to issue his warrant. Now in this case the jurisdiction of the justice is well initiated. Then comes the proviso which limits the exercise of their jurisdiction. It provides that, although the subject-matter be under 10*l.*, yet if there should be a purpose notified by the party who is brought before the justices, that he means to dispute the validity of the rate or his liability to pay it, the justices shall forbear. This is the point at which they are to hold their hand. I cannot dicover any thing conflicting between this proviso and the enacting part, when I refer the language of each to its proper object. The enacting clause refers to the commencement of the justice's jurisdiction; the proviso to the proceeding upon it after it has well attached: it says they shall forbear giving judgment thereupon; it does not exclude them from jurisdiction, but only from proceeding further, and it adds, "the person may then proceed to recover his demand according to the due course of law as before accustomed." Therefore it is a *cesser* of the proceeding before the magistrates. Thus, by referring the introductory part and the proviso to their proper object, the whole is consistent; and the only question that remains is, whether what passed before the magistrates was a sufficient notice of the party's intention to dispute the rate. To be sure this part of the case makes the statute liable to great uncertainty in its application. And, perhaps, if a person was merely to say before the justices, that he disputed the rate, it would not be sufficient, inasmuch as he ought to shew something to manifest that he disputed it *bonâ fide*. But here the party says in effect, "I dispute the validity

1816.

The King against The Chapel-wardens of Milnrow.

duty of the rate," and not only so, but he gives his reason for it, which may, perhaps, be a bad one, "because he had no claim to or seat in the chapel." Nevertheless the reason, however disputable its efficacy may be, was grounded upon a matter which might be litigated in the proper forum. Therefore it does not appear that there was any *mala fides*; on the contrary, it appears that the party had premeditated the subject-matter of dispute, and it is further stated, that he had consulted thereon with ecclesiastical lawyers. Then was it not sufficiently intimated to the justices by the party that he disputed his liability, so as to satisfy the general language of the proviso? It is disputed on a colour at least and ground of right, and the justices are informed that he means to stand on it, for that if they proceed to levy the rate he would bring his action. I think, therefore, that this was such a notice to the justices of the party's disputing the rate as called upon them to forbear proceeding to judgment. As to the argument derived from the appeal, it is not difficult to conceive many causes of appeal besides that which might affect the validity of the rate, to account for such a provision.

Bayley J. Looking at the object of the enacting clause, and of the proviso in question, I think they are consistent with each other, and that no difficulty arises in this respect. Before the passing of this statute, a considerable delay and expence was incurred in the recovery of church-rates. This was a considerable hardship on the churchwarden, and also on the party paying the rate. The object of the legislature, as it seems to me, was not to draw questionable cases *ad aliud*

examen,

1816.

The KING *against* The Chapel wardens of MILNROW.

examen, but to provide a summary remedy in cases where the party did not dispute the obligation to pay. The legislature never intended to deprive the party of his right to have the validity of the rate questioned in the proper forum. The enacting clause provides "that a justice of the peace may issue his warrant, if the validity of the rate has not been questioned in any ecclesiastical court; therefore, if it has been questioned by libel, appeal, or otherwise, in which the parties rated are actors, there the justice cannot interfere: his jurisdiction is stopped *in limine*. But, supposing the justice entitled to issue his summons, still it was not intended to deprive the party of his right to have the validity of the rate or his liability questioned in the proper forum; and, therefore, at the hearing before the magistrates he may insist on this right, and give notice that he means to dispute the validity in the ecclesiastical court. The legislature never intended the magistrates should enter into the discussion of that question, and it would have been hard if they had enacted otherwise. I think, therefore, that the jurisdiction of the magistrates was well determined by the party's insisting on disputing his liability to pay the rate. Then the only question is, whether he gave sufficient notice. His language before the justices is thus, "I will bring an action against any person who ventures to levy the rate: I think I have no right to pay, because I have no claim or seat in the church." Whether this be or be not a valid ground for disputing his liability to pay the rate, it is not for us to decide; nor was it for the justices, against the will of the party. It seems to me that the party had a right to insist that this question should go before the ecclesiastical court.

HOLROYD

1816.

The KING *against* The Chapel-wardens of MILNROW.

HOLROYD J. (*a*) I am entirely of the same opinion. The enacting part of the clause which gives jurisdiction to the justices, enacts, that if the validity of the rate has not been questioned in any ecclesiastical court, one justice may summon the party refusing to pay to appear before two justices, so that the condition respecting the proceeding in any ecclesiastical court applies to the issuing of the summons, and is not inconsistent with the party's disputing the validity of the rate when he comes before the justices, although a proceeding may not then have been instituted in the ecclesiastical court. Neither does the appeal afford to my mind any argument against this construction, because there are numerous grounds of appeal to which that provision may be referred. It seems to me, also, that the notice was sufficient that the party disputed his being liable, for he said that which was tantamount to saying that he was not liable. This is somewhat analagous to what happens in the ecclesiastical court when a modus is pleaded, for in that case, although the court had jurisdiction before, yet it cannot proceed afterwards against the consent of either party. It seems to me that the legislature intended that the magistrate should not have any jurisdiction to determine the validity of the rate or the liability of the party to pay it, but that this question should be left, as before, to the ecclesiastical court, the proper jurisdiction.

Order of Sessions confirmed.

(*a*) *Abbott* J. was absent.

1816.

The KING *against* The Inhabitants of ARUNDEL.

Saturday, June 22d.

An infant may bind himself apprentice by indenture, because it is for his benefit, and, though he be a pauper in the parish workhouse at the time of the binding, and the parish officers pay the premium, yet it is not necessary that they should sign the indenture, or that the justices should assent thereto, if the apprentice be not a parish apprentice within the meaning of the statute 43 *Eliz.* c. 2.

UPON appeal, the quarter sessions for the county of *Sussex* quashed an order for the removal of *George Slater* from *Arundel* to *Ferring*, subject to the opinion of this Court upon the following case:

The pauper was bound apprentice to one *Barber*, by indenture, in the usual form (*a*), having a thirty-shilling stamp, and regularly executed by *Barber* and the pauper, but not signed by any of the parish officers of *Arundel*, or assented to by any of the justices; and the question was, whether the signature of the parish officers, and the assent of the justices, were necessary to the validity of this indenture, under the following circumstances: The pauper was a cripple settled in *Arundel*, and his mother, in the first instance, applied to *Barber*, and expressed a wish that her son might be placed with him as an apprentice. The pauper, at the time when the indenture was executed, was eighteen years of age, and had been, for about a year before, and was then, in the *Arundel* workhouse, from whence he went to the attorney's office, where the indenture was executed, and met there his father and the parish officer; and it was agreed between *Barber* and the parish officer, that the pauper should go into the service of

(*a*) The indenture began, "This indenture witnesseth, that *G. Slater*, of *Arundel*, in the county of *Sussex*, aged nearly eighteen years, of his own free will doth put himself apprentice to *C. Barber*, of *Patching*, cordwainer, &c. for four years, &c.; and the said *C. Barber*, in consideration of the sum of 40*l*. to him in hand paid, &c."

1816.

The King *against* The Inhabitants of Arundel.

Barber, and that the parish should pay the sum of 40*l.*, which was paid accordingly out of the fund belonging to *Arundel*. The pauper's father was present when the indenture was executed, and it was read over at the time. The pauper stated at the sessions that he had not been previously consulted, and that it was not with his good will that he went into the service, but that he never expressed to any one any objection to being bound. *Barber*, at the time of the execution of the indenture, lived at *Patching*, and continued there a year and a half afterwards, and then removed to *Ferring*, accompanied by the pauper, who continued in that parish with his master, under the indenture, for nearly a year.

The sessions considered the pauper as having been put out by the parish, and that, under these circumstances, the indenture was void.

Courthope, in support of the order of sessions, argued, that the justices at sessions were not estopped from enquiring into the real nature of the binding, by the pauper's having executed the indenture, and acknowledged therein, according to the usual form of such indentures, that he of his own free will put himself apprentice, and by his subsequent acquiescence in what had been done by serving under the indenture; for, if these considerations were sufficient to preclude all enquiry as to whether the binding were compulsory or not, the statute 43 *Eliz. c.* 2., which was passed for the protection of infant paupers against the power of the parish officers, would be eluded by the very means against which it was intended to provide. And if it were competent to the sessions to enquire whether the binding

1816.

The KING against The Inhabitants of ARUNDEL.

binding was of the pauper's own free-will, it was also competent to them, inasmuch as there was conflicting evidence upon that point, to draw their conclusion in the manner they had done.

D'Oyly, contrà, was stopped by the Court, after having cited *Newberry* v. *St. Mary's* (a), and *Gylbert* v. *Fletcher* (b), in support of his position, that an infant may bind himself apprentice, even without consent of parents, because it is for his benefit.

Lord ELLENBOROUGH C. J. This indenture must be considered clearly as for the infant's benefit; and not having been vacated, it must be considered as binding, so as to confer a settlement on him by reason of his service under it. This was not the binding of a parish apprentice; it was to a person not residing in the parish; and all that the parish officers did was the advancing of 40*l.* as the premium. As to any supposed controlling influence of the parish officers, I do not see how we can enter upon that subject, nothing being stated concerning it in the case. The influence, however, seems to have been that of the mother; the parish officers make the advance, and the pauper executes the indenture. I think the binding was undoubtedly for his benefit, and therefore valid.

BAYLEY J. The pauper executed the deed without objection, and there was not any compulsion used at that time.

Per Curiam,

Order of sessions quashed.

(a) *Foley's P. L.* 154. (b) *Cro. Car.* 179.

Saturday, June 22d.

The KING *against* The Inhabitants of the Parish of ST. GILES, CAMBRIDGE.

Indictment against a parish for non-repair of a highway lying within it; plea, that the inhabitants of another parish *have repaired, and been used and accustomed to repair, and of right ought to have repaired* Held ill, for the plea ought to have shewn a consideration.

PRESENTMENT for not repairing a highway in the parish of *St. Giles, Cambridge.* Plea, that the inhabitants of the parish of *Great St. Mary,* in the town of *Cambridge,* from time whereof, &c. until the passing of the act 37 *G.* 3. *c.* 179. have repaired, and been used and accustomed to repair, and during all that time of right ought to have repaired, and but for the passing of the said act, and the provisions therein made respecting the repairs of the said part of the said king's common highway in the presentment mentioned to be in decay, from the passing of the said act hitherto of right ought to have repaired, and still of right ought to repair, the said part of the said highway, when and as often as it hath been or may be necessary; and that by the said act, intituled, &c. it was (among other things) enacted, that the said part of the said highway (setting it out) should, from and after the passing of the said act, be repaired by trustees therein mentioned; and that the inhabitants of *Great St. Mary* should be exempted from repairing the same, in consideration of 150*l.* agreed to be contributed by them towards the expence of making and repairing the same; and that in and by the said act it was farther declared, that the said act, and all the powers thereby given, should commence and take effect the day the same should receive the royal assent, and should continue thenceforth for twenty-one years next ensuing, and thence to the end of the next session

of

1816.

The KING *against* The Inhabitants of St. GILES.

of parliament; and that the said act is in full force. Without this, that the inhabitants of the said parish of *St. Giles* the said part of the highway ought to repair and amend, when and so often as should be necessary, as by the said presentment is above supposed, &c. Demurrer. Joinder.

This case was argued partly in the last term, and again on this day.

Marryat, in support of the demurrer, took several exceptions to the plea; 1st, Because the highway, lying wholly without the parish of *St. Mary*, the parish is nevertheless charged with the repairs by prescription, without shewing any consideration; whereas prescription imports a lawful beginning, which, where there is no common law liability, must have arisen from some consideration; so that the defendants, if they would plead *that another ought to repair*, ought to shew for what cause; as *ratione tenuræ*, or by reason of inclosure; though it is otherwise if a corporation be charged, because they may be bound without consideration. But this is the first instance of a parish, which of common right ought to repair all the highways within it, attempting to shift the burden upon others, without shewing in what manner they became bound to repair.

2dly, Supposing the plea good to charge the parish of *St. Mary* in the first instance, the act of parliament, which has exempted this parish from the repair, throws the burden back again upon the defendants, who are liable at common law (a): which burden is not removed from

(a) *Rex* v. *Sheffield*, 2 *T. R.* 106.

1816.

The King *against* The Inhabitants of St. Giles.

them by the interposition of trustees for the repair of the highway, because the trustees are only in aid, not in lieu of the parish (*a*), being appointed but for a term, and not being compellable to repair beyond the means in their hands; and, therefore, the general turnpike act (*b*) contemplates that the parish, and not the trustees, are indictable; but if the trustees were indictable, yet the plea is ill, because it ought to have shewn with certainty, by naming the trustees, on whom the burden lay. (*c*)

3dly, The plea is informal, because it amounts to the general issue; for upon not guilty it would have been competent to prove the liability of the trustees. (*d*)

4thly, The plea ought not to have concluded with a traverse of the defendants' liability. (*e*)

Gaselee, contrà, as to the last objection, contended, that it was the invariable practice to conclude with a like traverse to the present. (*f*) As to the other objection of form, he argued, that oftentimes matter may be pleaded specially, though it may be given in evidence on the general issue; as in conspiracy, the defendant may plead a legal prosecution (*g*); in *assumpsit*, payment (*h*); in debt, a release (*i*); yet all these may be proved on the general issue: and, therefore, to demur to this plea, because it amounts to the general issue, without more, is not enough; for it is in the discretion of the Court whether the plea shall be allowed or not.

(*a*) *Rex* v. *St. George's, Hanover Square*, 3 *Campb. N. P. C.* 222.

(*b*) 13 *G.* 3. c. 84. s. 33.

(*c*) *Rex* v. *Bridekirk*, 11 *East*, 304.

(*d*) *Rex* v. *St. George's, Hanover Square*, 3 *Campb. N. P. C.* 222.

(*e*) *Richardson* v. *Mayor of Orford*, 2 *H. Bl.* 182.

(*f*) See *Crown Circ. Assist.* ed. 1787. 402. 404. 5 *Burr.* 2594.

(*g*) *Cro. Eliz.* 87

(*h*) 1 *Salk.* 394.

(*i*) *Ibid.*

With

1816.

The King against The Inhabitants of St. Giles.

With respect to the first objection, he admitted the doctrine of Lord *Coke* (*a*), that a particular person cannot be bound by prescription, viz. that he and all his ancestors have repaired, if it be not in respect of the tenure of his land, or because that he hath the land adjoining; *aliter* of a corporation. And the distinction seems founded on this; because the act of the ancestor cannot charge the heir without profit; but a corporation, which hath a lawful being, may be charged, that they and their predecessors time out of mind have repaired, for the predecessors may bind their successors; and as in judgment of law a corporation never dies, if it were ever bound to repair, it must needs continue to be so. Now, though there is no precedent for charging the inhabitants of a parish with the repairs of a highway situate without the parish, yet there seems as good reason for charging them in a case like the present with the amendment of a highway, as there is for charging a part of a parish in exclusion of the parish at large with the amendment of highways within it; both are alike against common right; yet is it the daily practice in pleading to charge the inhabitants of a township that they have immemorially repaired, without shewing any consideration (*b*); the reason of which may be, that though not actually a corporation, they being a body subsisting by succession, may have been deemed a *quasi* corporation. In *Rex* v. *Marlon* (*c*), and *Rex* v. *Great Broughton* (*d*), it was not doubted that an indictment against the inha-

(*a*) 13 *Rep.* 33. 1 *Hawk. P. C. c.* 76.

(*b*) MSS. precedents to this effect, signed by *Yates* J. and by *Chambre* J., when at the bar, were referred to. Also, *Cro. Cir. Assist.* 404. 4 *Wentw. Plead.* 164. And *Rex* v. *West Riding of York*, 5 *Burr.* 2594.

(*c*) *Andr.* 276. (*d*) 5 *Burr.* 2700.

1816.

The King *against* The Inhabitants of St. Giles.

bitants of a division of a parish, alleging that they had immemorially repaired, would be sufficient. And if a consideration may be implied in the case of a corporation, which is sometimes said to be the reason why prescription without more is good against them, why may it not also be presumed in this case that at some period before time of memory lands were granted in trust for the parish of *St. Mary*, in respect of which they are bound to repair? or that the passage over this land, being more beneficial to them than to others, they took on themselves the repair of the highway, in consideration of having the land dedicated to this purpose? As to the remaining objection, that the act of parliament, by removing the burden from *St. Mary*'s parish, throws it back upon the defendants, it is observable that in *Rex* v. *Sheffield* the duty of repairing was originally cast upon the parish by the same authority which empowered the making of the highway; for the act of parliament, by virtue of which the highway was made, directed that the highways to be made in pursuance of that act, *should be highways to all intents and purposes, and should be repaired as such*; and at the same time exempted the township of *Sheffield*, which would otherwise have been liable to repair. But in this case the road is an ancient road, repairable, as far as appears, from all time by *St. Mary*'s parish, from the burden of which they have purchased their exemption by an equivalent agreed to be paid to the trustees; it would be strange, therefore, if under this agreement the act should be held to relieve the parish of *St. Mary* at the expence of the defendants, who are strangers to the agreement; the intention of the act plainly being to substitute the trustees for the parish of *St. Mary*.

Lord

1816.

The KING *against* The Inhabitants of ST. GILES.

Lord ELLENBOROUGH C. J. Although this case has led to great length of discussion, I confess that my mind has not been much advanced since the first opening of the argument. The principle of law I take to be clear, that the inhabitants of a parish are liable of common right to repair the highways lying within it, unless they can shew that this burden is cast upon some other persons, under an obligation equally durable with that which would have bound the parish, which obligation must arise in respect of some consideration of a nature as durable as the burden cast upon them. Now in the present case nothing of this kind appears; but all that is alleged is, that the parish of *St. Mary* has immemorially repaired. This I hold to be insufficient; and, therefore, the defendants having failed to shew any consideration binding upon the persons whose liability they would needs substitute, the burden must rest with themselves. I do not go into the question touching the effect of the *exemption*, because my opinion is founded on this, that no consideration being pointed out whereby to subject the inhabitants of the parish of *St. Mary* to the reparation of a highway lying *in alienâ parochiâ*, the law will not cast this burden upon them. To hold otherwise would, I think, be raising a doubt as to the common law liability of parishes to amend their own highways. It appears to me that the defendants are liable, inasmuch as they have not shewn any others who are.

BAYLEY J. I am entirely of the same opinion. There is not any case which looks to an obligation like the present. Particular persons cannot be charged by prescription

1816.

The King *against* The Inhabitants of St. Giles.

scription without shewing a consideration; but a corporation sole or aggregate may be bound to repair by usage, or prescription, without more. Here I find no consideration alleged; and Mr. *Gaselee* was put to great difficulty in suggesting any. It was suggested by him, that the land over which the highway lies might originally have been dedicated to the public, in consideration that the parish of *St. Mary*, who were chiefly benefited by it, would undertake the burden of its reparation. This struck me at first as plausible; but upon consideration I think that this cannot be; because the inhabitants of a parish cannot, as if they were a corporation, bind their successors; if they could, and were to become once liable, they must remain so for ever, however useless the highway might in after ages turn out to be.

Holroyd J. (*a*) I am of the same opinion. The only ground of distinction that can be suggested between this case and the case where particular individuals are to be charged, has been suggested; viz. that inasmuch as a parish is composed of a body of inhabitants which has continuance by succession in like manner as a corporation, a parish may also be charged as a corporation, although, like it, the parish, individually, is perpetually changing. It has been said that it might have been for the convenience of the parish of *St. Mary* that this land was dedicated to the public for the purpose of a highway; and that in consideration of this boon the parish might have taken on themselves the burden of

(*a*) *Abbott* J. was absent.

its

1816.

The KING *against* The Inhabitants of ST. GILES.

its reparation. But I think, upon reflection, that this could not be a legal consideration binding on the successors, because a burden might thereby be imposed on them beyond the benefit which they were to receive; for they would have to repair the highway not only for their own use, but also for the public. This plea then is improperly pleaded; for when the highway lies out of the parish, a consideration must be shewn. I say nothing as to the form of pleading where the highway lies within a township or division of a parish, which is charged with the repairs. (*a*)

Judgment for the Crown.

(*a*) See *Rex* v. *Ecclesfield*, 1 *B. & A.* 348.

RAMSTROM and Another *against* BELL.

Tuesday, June 25th.

Policy on goods at and from *Stockholm* to *Swinemunde*; and the ship being driven into *Wisby* on 30th *May*, and detained there till the 9th *October*, the assured, on 1st *July*, wrote to their agents in *London*, "that the captain had been ordered to proceed to *Konigsberg*, as they were not certain whether the enemy might be at *Swinemunde* or not, and that the passage to *Konigsberg* was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters," which letter the agents receiving on the 12th *July*, applied to the underwriters for their consent to alter the policy, by adding the words "*Konigsberg* or *Memel*" after "*Swinemunde*," which consent was obtained; and the ship and goods were afterwards lost in their voyage to *Konigsberg*: Held, that this alteration did not require a new stamp, being within 35 *Geo.* 3. *c.* 63. *s.* 13.

ASSUMPSIT on a policy of assurance upon iron on board the ship *Ceres*: plea, non assumpsit. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after *Hilary* term, one question was, whether the policy required a new stamp on account of an alteration made in it under the following circumstances:

The policy was originally at and from *Stockholm* to *Swinemunde*. The captain took charge of the ship at

Stock-

1816.

RAMSTROM *against* BELL

Stockholm, and she sailed from thence for *Swinemunde* with a cargo of iron, on the 14th *May*, 1813, the ship being then in good condition: stormy weather came on, and she sprung a leak, and was in consequence obliged to put into *Wisby* on the 30th. There her cargo was unloaded, this being necessary in order to get at the leak, and she was surveyed and repaired. Her repairs were not finished before some time in *September*, on account of the scarcity of hands, they being employed in military service; but on the 9th *October*, as soon as the wind was favourable, the cargo having been reloaded, she sailed from *Wisby* for *Konigsberg*, having received orders to that effect at *Wisby*, and was lost in her voyage thither in a storm. While the ship thus lay at *Wisby*, on the 1st *July*, the plaintiffs wrote from *Stockholm* to their agents in *London*, informing them "that the captain had received orders to proceed to *Konigsberg* with his cargo, after having finished the repairs of his vessel at *Wisby*, as they were not certain how things went on in *Swinemunde*, whether the *French* might be there or not:" and they added, "that the passage to *Konigsberg* was nearly the same, but rather the shortest and safest of the two, of which they desired the agents to inform the underwriters, and arrange the matter with them." In consequence of this letter, which was received by the agents on the 12th of *July*, the underwriters, the defendant being one, were applied to for their consent to alter the policy, by adding "to *Konigsberg* or *Memel*," to which the underwriters agreeing, the words "*Konigsberg* or *Memel*" were inserted immediately after *Swinemunde*. This was the alteration, which it was contended required a new stamp. A verdict was found for the plaintiffs, the point being reserved.

reserved. Accordingly, the Attorney-General having obtained a rule nisi for setting aside the verdict,

1816.

RAMSTROM *against* BELL.

Scarlett and *Tindal*, who shewed cause, referred to stat. 35 *G.* 3. *c.* 63. *s.* 13., which saves the necessity of a fresh stamp in cases where an alteration in the policy is made "before notice of the determination of the risk originally insured;" which, according to *Kensington* v. *Inglis* (*a*), means such a determination of it as is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage; and therefore, in that case, a memorandum written on the policy, on a day subsequent to the time originally prescribed for the ship's sailing, extending the time of sailing, was held not to require a new stamp. So a policy containing a warranty that the ship shall sail on or before a particular day, may be altered pending the risk, by a memorandum cancelling the warranty, without a fresh stamp; and the altering of the mark on goods requires no new stamp (*a*). Now, here, the subject matter insured continued the same, and the interest the same; and the risk originally insured not being determined, was rather diminished by going to *Konigsberg*.

The *Attorney-General* and *Taddy*, contrà, insisted, that upon the true construction of the act, which requires that the alteration shall be made "before notice of the determination of the risk;" and consistently with the authorities cited *è contrà*, the alteration made a new stamp necessary; for here the risk was

(*a*) 8 *East*, 273.

(*b*) *Ridsdale* v. *Sheddon*, 4 *Campb.* *N. P. C.* 107. *Hubbard* v. *Jackson*, *Taunt.* 169.

deter-

1816.

RAMSTROM *against* BELL.

determined "by the final end and conclusion of the voyage," which took place when it was decided that the vessel could not proceed to *Swinemunde*, the *terminus ad quem* of the original risk; and the alteration was not made until after notice of the determination; so that the case at bar fails in the two main points requisite to bring it within the saving clause of the act, and differs in both these respects from *Kensington* v. *Inglis*. There is no authority for holding that the place of destination may be altered without determining the risk. The time may be extended, and yet the voyage remain the same; but how can it be the same, if the termini be changed?

Lord ELLENBOROUGH C. J. It seems to me that the argument for the Defendant has confounded a contemplation to determine the voyage with the actual determination of it. The assured had a purpose of change arising *ex justâ causâ*, and while it was in contemplation the proposal was made to the underwriter, and assented to by him, that *Konigsberg* should be the ship's destination. If the underwriter had not assented, the assured might have thrown the risk upon him by going to *Swinemunde*; instead of which, the application is made for the underwriter's benefit. The act says, "so that the alteration be made before notice of the determination of the risk." This alteration was made while there was only an intention to determine the risk.

ABBOTT J. (a) This is a case of a change of destination made with the assent of the underwriter, at a

(a) *Bayley* J. left the Court during the argument.

time

time when the risk was not determined, and when, if he had not consented, the vessel might have proceeded at his risk.

1816.

RAMSTROM *against* BELL.

Per Curiam, Rule discharged.

The KING *against* W. SMITH.

Wednesday, June 26th.

In *quo warranto* for exercising the office of mayor, upon issue joined, that *H.*, the presiding officer at defendant's election, was not then mayor, the title of *H.* to be mayor, and not merely whether he was mayor *de facto*, is put in issue; and evidence was held admissible to shew that *H.* had not been lawfully elected, *H.* being then dead; but, before his death, an information having been filed against him for usurping the office. *Semble*, that it is not competent, on the trial of an information of *quo warranto* against the *elected*, to impeach by evidence the titles of the electors, unless they are specially questioned on the record.

UPON an information in nature of *quo warranto*, against the defendant, for exercising the office of Mayor of *Colchester*; the defendant pleaded (*inter alia*) (*a*), that by letters patent (9th *September*, 1763,) the king constituted the borough a free borough, and that the free burgesses should be incorporated by the name of the Mayor and Commonalty of the Borough of *Colchester*; and that there should be chosen out of the free burgesses, one mayor, 11 aldermen, 18 assistants, and 18 common council; and that yearly, on a day named, the free burgesses, or the major part of them, should nominate two of the aldermen as for the mayor, and the residue of the aldermen, or the major part, after that nomination, should elect one of the aldermen so nominated, to be mayor, who should be sworn in at the *Michaelmas* day following, before the last mayor, and the residue of the aldermen, assistants, and common council, or so many of them as should be then present, of whom the last mayor, if living, to be one, &c.; and the plea alleged, that, on the charter-day, in the year 1809, at an assembly held for the purpose of electing a mayor, the free burgesses duly nominated the defendant and

(*a*) For the other pleas, and a more full detail of the charter, see *ante*, vol. ii. 583.

W. Phil-

1816.

The King *against* Smith.

W. Phillips, then being two of the aldermen, to the intent that the then mayor, and the residue of the aldermen, or the major part, should elect one; and that they duly elected the defendant to be mayor for one year, from *Michaelmas* next, and that he was duly sworn in, before *Thomas Hedge*, the last mayor, and such of the residue of the aldermen, assistants, and common council as were then present, and was admitted into the office; and that after his election, and during the time of his supposed usurpation, there was not any other person elected and duly sworn into office, &c.

Replication, first, that the then mayor, and the major part of the residue of the aldermen, did not elect the defendant to be mayor in manner and form as pleaded; secondly, that the defendant did not take his corporal oath according to the directions in the said letters patent, in manner and form as pleaded. On both these, issue was joined. Thirdly, that at the supposed assembly, and at the supposed election and swearing in of the defendant, one *Thomas Hedge*, the elder, acted and presided as mayor, and that the said *Thomas Hedge* the elder was not then mayor. Rejoinder, that at the time, and on the occasion in the replication last mentioned, the said *Thomas Hedge* was mayor. On this, issue was joined. At the trial, before *Wood* Baron, at the *Essex* Spring assizes, 1815, a verdict was found for the Crown, subject to the opinion of the Court on the following case:

The defendant, in maintenance of the two first issues, proved, that on the charter-day (4th *September*, 1809) he, together with *W. Phillips*, being two of the aldermen, were nominated by the free burgesses, as in the plea alleged. He also proved, by entries in the corporation books, that *Thomas Hedge* the elder acted and presided

as

1816.

The KING *against* SMITH.

as mayor on that occasion, having been nominated, elected, and sworn into that office, on the regular charter-day, in 1808; that at the defendant's election, in 1809, there were present besides *Thomas Hedge* senior, who acted and presided as mayor, five other persons, acting as aldermen, exclusive of *Phillips* and the defendant; and that four other persons, entered in the corporation books as then being aldermen, were absent; that the mayor, and the five persons so present as aldermen (exclusive of the two nominees), elected the defendant to be mayor for the year ensuing; and that after the said election, the defendant took his oath of office upon the *Michaelmas* day following, before the said *Thomas Hedge* senior, acting as mayor, and the common council at the moot-hall. In support of the last issue, evidence was tendered on the part of the prosecution, to shew that *T. Hedge* senior had been illegally chosen mayor at the election in 1808; and in answer to the evidence on the two first issues, in order to impeach the defendant's election, evidence was also tendered, that two of the said five persons present as aldermen at the defendant's election, of the names of *Abell* and *Smythies*, had been illegally elected and sworn in as aldermen, and had been since ousted by judgments on informations of quo warranto against them. The defendant's counsel objected to the admission of this evidence, as well as of that which went to impeach the title of *Hedge* senior, more especially as he was then dead; having died, as it was admitted, on the 4th day of *July*, 1814; but it was also proved, that prior to his death, viz. in *Trinity* term in the same year, an information of quo warranto, for usurping the office of mayor in the year 1808, and at the time when the defendant's election took place, had been filed against him; the issues in the present inform-

1816.

The King *against* Smith.

ation being joined and ready for trial, prior to and at the time of *Hedge*'s death. The learned Judge admitted the evidence, subject to the opinion of the Court as to its admissibility. It was then proved, with respect to the election of *Hedge* senior, that on the charter-day, 1808, one *Thomas Hedge* junior being then mayor, *Hedge* senior, and *W. Phillips*, being two of the aldermen, were put in nomination by the free burgesses, and that *Hedge* senior was elected; the aldermen then present (exclusive of the nominees and the mayor) being only four; one other, as appeared by the corporation books, being dead at the time, and other four being absent, one of whom, of the name of *Benjamin Smith*, had never in any manner taken upon himself the office of alderman, nor done any corporate act from his election until his death, nor had he taken the oath of office, which, by the charter, is essential to the completion of the title of alderman. *Hedge* senior, after his election, took the oath of office, before the then mayor, and acted as mayor during the ensuing year. With respect to the defendant's election, it was proved that *Abell* and *Smythies*, two of the aldermen then present, had been themselves elected in the presence of a less number of one of the classes in whom the election of an alderman is vested by the charter, than is required by the charter; and that informations of quo warranto had been filed against them in *Easter* term, 1813, for usurpation of their offices prior to the defendant's election, and from thence continually to the filing of the informations; to which they appeared, and confessed the usurpation, and disclaimed; and thereupon judgments of ouster were entered against one of them in the same term, and against the other in *Hilary* term following.

And

1816.

The KING *against* SMITH.

And two questions were now made upon these issues; first, whether evidence was admissible to shew that *Hedge* the elder had not been legally elected mayor at the election in 1808, he having acted as mayor *de facto*, and being dead at the time of the trial: Secondly, whether evidence was admissible to impeach the election of *Abell* or *Smythies*, who were present, and acted as aldermen at the defendant's election.

Spankie, for the crown, argued that the election of *Hedge* senior, in 1808, was void upon the principle, that where a corporate act is to be done by a definite body, a majority of that body must be present and concur in the act (*a*); whereas a majority of the residue of the aldermen, after the nomination of *Hedge* senior, and *Phillips*, was not present, four only being present of nine, which constitute the residue of the integral body of aldermen after the nomination. And he further argued that, upon these pleadings, the legal title of *Hedge* senior as mayor was put in issue, and therefore evidence was admissible to impeach that title. Although *Hedge* senior acted as mayor *de facto*, it is to be observed, that where strangers are not interested, acts done by an usurper, or a mayor *de facto*, or under his authority, are void. For, as in civil actions, the plaintiff must recover on his own title: so in cases of information in nature of *quo warranto*, for usurpations upon the rights of the crown, the defendant must at once shew a complete title. If he fail in it, or in the chain of it, judgment must be given against him. (*b*) Therefore, in *Rex* v. *Lisle* (*c*), the Court strongly inclined, that the presence of a

(*a*) *Rex* v. *Bellringer*, 4 *T. R.* 810. *Rex* v. *Miller*, 6 *T. R.* 268.

(*b*) *Rex* v. *Leigh*, 4 *Burr.* 2146, 47. per *Yates* J.

(*c*) 2 *Str.* 1090. More fully reported in *Andrews*, 163. See p. 174. See also *Rex* v. *Malden*, 4 *Burr.* 2135. 2140.

1816.

The King *against* Smith.

mayor *de facto*, recently prosecuted, and against whom judgment of ouster had been obtained, would not be sufficient to authenticate the defendant's election. So in *Rex* v. *Hebden* (*a*), the defendant made title to the office of bailiff, from an election under the bailiffship of *Batty* and *Armstrong*; and on issue joined, whether these were bailiffs or not, a record of a judgment of ouster against them was read in evidence, and was afterwards held to have been properly admitted. Yet it appeared, that *Batty* and *Armstrong* had been bailiffs *de facto*. The like evidence was admitted in *Rex* v. *Grimes* (*b*), and the Court gave judgment against the defendant, on the ground, that *Leigh*, who had presided at his election, was not a rightful mayor. Nor does the death of *Hedge* senior, in this case, preclude the admission of evidence to impeach his title; for this is different from *Rex* v. *Spearing* (*c*), where the party died in the undisturbed possession of his franchise: and, besides, the statute 32 *G.* 3. *c.* 58., which passed since that decision, fixes the time, which, before then, was discretionary, within which titles may be impeached.

Upon the second question, he contended, that the arguments already urged, applied in an equal degree, if not *à fortiori*, in favor of the admissibility of evidence to impeach the titles of *Abell* and *Smithies*. For the issue being, whether the defendant was elected by the major part of the residue of the aldermen, what could be more directly in point than to shew that two of the residue who elected him were not aldermen? In *Foot* v. *Prowse* (*d*), it was not doubted that the title of the

(*a*) 2 *Str.* 1109. *Andr.* 388. *S. C.*

(*b*) 5 *Burr.* 2598. *S. P. Rex* v. *Smart*, 4 *Burr.* 2241. *Rex* v. *Mallet*, 2 *Barnard.* 408. *Rex* v. *Harding*, cited in *Rex* v. *Kynaston*, *Cas. temp. Hardw.* 150.; and in *Rex* v. *Lisle*, *Andr.* 163.

(*c*) 1 *T. R.* 4. *n.*

(*d*) *Str.* 625.

aldermen present at the election might be enquired into.

Scarlett, contrà, argued, upon the first question, that the title *de jure* of *Hedge* senior to be mayor, was not in question; the issue that he was not mayor involving only the fact, and not the right. And in answer to *Rex* v. *Lisle*, he said, the issues not being stated in the report, *non constat* that the title of the mayor *de jure* was not the very question upon record; but, taking it as an authority in point, it amounts to no more than the strong inclination of the Court, in a case where the title had been recently prosecuted, and where a judgment of ouster had been obtained; both which are wanting in the present case. And it is remarkable, that *Aston* J. refers to this authority as to the inclination of the Court, but adds, at the same time, that he would give no opinion on this point. (*a*) The issue, then, that *Hedge* was not mayor, importing that he was a mere usurper, without any color of title, is well met by shewing him mayor *de facto*, and cannot be answered by imputing to him merely an imperfection of title, as if he were the party litigant. And, supposing his title liable to be impeached in this collateral proceeding, yet upon this issue the evidence was inadmissible; for if it had been meant to go beyond a denial of the fact, it ought to have been replied specially, that although *Hedge* acted colorably as mayor, yet was he not mayor *de jure*; which would have given notice to the defendant of the point intended to be raised. But, if any thing more were wanting, the death of *Hedge* would, of itself, be sufficient to preclude farther enquiry. For it is a well

(*a*) *Rex* v. *Malden*, 1 *Burr.* 2140.

1816.

The King against Smith.

known rule in practice, that a man's title to an office, which he has been permitted to exercise during his life, shall not be impeached after his death, so as to affect other men's rights. And the reason of this is plain; because, if living, he might possess both knowledge and means to protect his own title, which by his death are lost: the loss of which, peradventure, might operate to the prejudice of other men's titles, if his were to remain open to impeachment. Wherefore, in *Rex* v. *Spearing* (a), *Blackstone* J. would not suffer the parties to go into evidence to impeach the title after the death of the person from whom it was derived As he had, in fact, been mayor, it should be taken that he had been regularly so. But if it were material, upon the present occasion, to go into the validity of *Hedge*'s title, it might be contended that his election was well made; for the charter, in prescribing that the residue should elect after the nomination, had for its object, principally, to point out the time when the election should take place; viz. that it should follow the nomination; consequently, it would be a forced construction of its language to interpret what is mandatory only in respect of time, as exclusive of particular persons, which persons it would have been easy to exclude by express words, if it had been so intended. Now it appears that there were present at *Hedge*'s election, besides the mayor and the two nominees, four aldermen, who concurred in his election, making altogether seven, which was a majority of the mayor and the rest of the aldermen.

Upon the second question, he submitted, that it was not competent, upon this record, to go into evidence to disqualify particular voters. Such a course, it is obvious, would lead to interminable enquiry, for it cannot

(a) 1 T. [illegible]

stop

1816.

The KING *against* SMITH.

stop with the particular voter, but must pervade the titles of those from whom he derives title, and so on *in infinitum*; which would be pregnant of the most serious inconvenience. And how is it possible for a party without notice, to be prepared to defend the title of every voter? Therefore, in *Symmers* v. *Regem* (a) it was holden, that the rights of the voters to their corporate franchises could not be gone into on the trial of the rights of the elected, without notice on the record or collaterally; Lord *Mansfield* C. J. observing "This is settled, that no corporator is bound by surprise to go into the original qualification of any corporator in possession, who voted for him at his election, especially without notice."

Lord ELLENBOROUGH C. J. As to the question, whether it is competent to impeach, upon a collateral issue concerning the rights of the elected, the title of the voter; if the case had turned upon it, I should have desired further time for consideration: the language of Lord *Mansfield*, in *Symmers* v. *Regem*, is certainly very strong. But upon the competency to enquire into the validity of the election of *Hedge*, the presiding officer at the defendant's election, I cannot entertain a doubt. To constitute a valid election of mayor under this charter, it is necessary that a majority of the aldermen, after deducting the nominees, taking this body to exist in the manner constituted by the charter, should be convened and present; instead of which, independently of the mayor and the two nominees, we find there were but four present. Therefore, without going further, this

(a) 2 *Cowp.* 489.

1816.

The King *against* Smith.

seems to me to constitute a sufficient objection to the defendant's title.

Bayley J. I am entirely of the same opinion. I think the third issue raises the question, whether *Hedge* was a lawful mayor. The issue taken is, that *Hedge* was mayor, which cannot be satisfied by proving him mayor *de facto*; but raises the question whether he was mayor *de jure*. The jury were not precluded from examining into his title; and if so, I think it is quite clear that he was not a lawful mayor. The right of election is in the mayor and residue of the aldermen, or the major part of them. If, by the residue of the aldermen, is meant that the nominees are to be included, then a sufficient number was present; but if "the residue" is exclusive of the nominees, the number was insufficient. When we look at the charter and the instances in which this word "residue" occurs in it, I think it is beyond a doubt that it is to be understood in an exclusive sense. The charter says, "the residue, or the major part, after the nomination;" which plainly imports an exception of those persons previously nominated. I cannot suppose that, in the same clause, it would give to different persons the right of election in case of death and on an ordinary election. If so, there is an end of the question, for there were not five present.

Abbott J. I entirely agree with my lord and my Brother *Bayley* upon this issue. It is not necessary to consider the others, although I think this case not distinguishable from *Symmers* v. *Regem*.

Holroyd

HOLROYD J. I am of the same opinion. If there was not a sufficient number of persons present, there was not an election; and if no election, then *Hedge* only exercised the office, and was never in by lawful title. He was not, therefore, mayor within the terms of this issue.

Judgment for the Crown.

SKIRROW *against* TAGG.

Thursday, June 27th.

An attorney does not lose his privilege by neglecting to renew his certificate at the expiration of his former certificate, if he renew it within the space of one year.

THE defendant, an attorney, had neglected to renew his certificate, which expired in *December* last, until *June*; and having been arrested in the interval, and compelled to give a bail-bond, obtained a rule *nisi* for his discharge, and for delivering up the bail-bond to be cancelled, on the ground of his privilege.

Reader, who shewed cause, objected on stat. 37 *G.* 3. *c.* 90. *s.* 30., that the defendant not having obtained his certificate, was in the situation of an attorney who had ceased to practise; and, being incapable of acting as an attorney, was, of course, deprived of his privilege. And he cited *Brooke* v. *Bryant*. (*a*)

Espinasse, in support of the rule, denied that the effect of the defendant's neglect to obtain his certificate was to suspend his functions of attorney during the interval, though it made him liable to a penalty An at-

(*a*) 7 *T. R.* 25.

1816.

SKIRROW *against* TAGG.

torney who has neglected to renew his certificate may nevertheless sue by attachment of privilege. (*a*)

Lord ELLENBOROUGH C. J. The statute enacts (*b*), that every person admitted, sworn, and enrolled as an attorney, who shall neglect to obtain his certificate thereof *for the space of one whole year*, shall *from thenceforth* be incapable of practising by virtue of such admission, entry, and enrolment, and the same shall *from thenceforth* be null and void. The act, therefore, attaches the incapacity, and prescribes the time: "*from thenceforth*," that is, if he neglect for the space of one whole year. I cannot alter the time fixed by the statute.

Per Curiam, Rule absolute.

(*a*) *Prior* v. *Moore*, *ante*, 2 vol. 605. (*b*) s. 31.

Friday, *June* 28th.

DUNN and Another *against* O'KEEFFE. In Error. (*a*)

The drawer of a bill of exchange is not discharged by the want of notice of non-acceptance, where the bill has passed into the hands of a *bonâ fide* indorsee for value, who had no knowledge of the disho-

ERROR to reverse a judgment given for the plaintiff, *Mary O'Keeffe*, against the defendants, *J.* and *T. Dunn*, in an action brought in the Common Pleas, in which the plaintiff declared that the defendants, on the 19th *June*, 1813, at *London*, according to the custom of merchants, made their bill of exchange, bearing date the same day, directed to Messrs. *Ricketts*, *Thorne*, *George*, and Co., and thereby required them, one month after date, to pay to the order of *J. Sinclair* 1000*l*., for

(*a*) See 6 *Taunt.* 305.

value

1816.

DUNN *against* O'KEEFFE.

value received; and that *Sinclair*, afterwards, and before payment of the money in the bill mentioned, or of any part, to wit, on the same day, by his indorsement, appointed the contents of the bill to be paid to the plaintiff, and delivered the same, so indorsed, to the plaintiff; and the plaintiff averred, that afterwards, to wit, on the 13th *July* in the same year, the bill was presented to Messrs. *Ricketts* for acceptance, and that they refused to accept; of which the defendants, afterwards, to wit, on the same day, had notice. By reason of which, according to the said custom, they became liable, &c.

The defendants pleaded non assumpserunt; and further, in bar of the action, that before the supposed indorsement of the bill to the plaintiff, and its presentment for acceptance, as in the declaration mentioned, to wit, on the 20th *June*, at *London*, the bill was presented by *Sinclair* to Messrs. *Ricketts*, for acceptance, and that they refused acceptance, and that notice of such refusal was not given to the defendants. The plaintiff, in reply, protesting that the plea and the matters thereof were insufficient to bar the action, traversed that before the presentment mentioned in the declaration, the bill was presented by *Sinclair*, and refused acceptance, as in the plea alleged.

And, at the trial, the jury found for the plaintiff, upon the non assumpsit; and upon the plea they found for the defendants, specially, that before the presentment mentioned in the declaration, the bill was presented by *Sinclair* to Messrs. *Ricketts* for acceptance, and that they refused to accept in the manner stated in the plea; and in case the Court should give judgment for the plaintiff, notwithstanding the finding on the plea, the jury assessed the damages at 1087*l*. Afterwards

1816.

DUNN *against* O'KEEFE

wards judgment was entered as follows: "Therefore it is considered, that notwithstanding the verdict in form aforesaid, found for the defendants, upon the issue joined between the parties upon the plea of the defendants by them secondly above pleaded in bar, the plaintiff recover against the defendants her damages upon the said count, by the jury in form aforesaid assessed, &c."

And the errors assigned upon this judgment were, that the defendants' plea was sufficient to bar the action, and, therefore, judgment ought to have been given for them, upon the issue and verdict thereon; and the common error was assigned upon the judgment given for the plaintiff, upon the promise in the said count.

And the point now insisted on for the plaintiffs in error, was this, that *Sinclair* having, by his laches, in omitting to give notice of the non-acceptance of the bill, discharged them from their liability, could not, by his subsequent indorsement to the defendant in error, revive that liability.

Which point was maintained by *Gifford*, for the plaintiffs in error, who argued, first, upon a consideration of the mutual engagements between the drawer and the holder of a bill of exchange. The drawer, he said, undertakes that the drawee shall accept the bill, and shall also pay it at the period of its maturity: upon failure of either of which conditions, the drawer becomes liable, provided he has due notice. The holder, on the other hand, undertakes for due diligence in seeking payment, and giving notice of any disappointment which may happen in the pursuit of it. It is indeed optional with the holder, where the bill is payable after date, to present it for acceptance, or to wait until the bill arrives at maturity, relying in the interval on the credit of the drawer, and present it at once for payment:

ment; but if he elect the former course, and acceptance is refused, he is as much bound to give notice of this refusal, as he would be to give notice of non-payment, if he wait till the bill becomes due, and payment is refused. (*a*) The reason of which has already, in part, been stated, viz. because, immediately on failure of the drawee to accept, the drawer or indorser becomes liable (*b*); whence it follows, that the drawer ought to have an opportunity, forthwith, of withdrawing his effects out of the hands of the drawee. Thus the mutual engagements between the drawer and holder of a bill of exchange requiring notice, the law has adopted the rule, and discharges the drawer if notice be not given; and it would be converting the rule of law into a dead letter, if the party violating it may, after the drawer is discharged, cure his own default, and by indorsing over the bill, revive the drawer's responsibility. It appears, however, that Lord *Ellenborough* thought differently of the rule of law, and of the means of evading it, when he pronounced, that "if the indorsers be once discharged by the laches of the holder at the time, in not giving due notice of the dishonour, their responsibility cannot be revived by the shifting of the bill into other hands." (*c*) If this were a question on whom the hardship ought to fall, it might be enough to state, that, on the one hand, the drawers are concerned, who have already suffered by want of notice, and were not privy to the subsequent indorsement; on the other, the indorsee, who derives her title immediately by indorsement, from

(*a*) *Blesard* v. *Hirst*, 5 *Burr.* 2670. *Goodall* v. *Dolley*, 1 *T. R.* 712. *Roscow* v. *Hardy*, 2 *Campb. N. P. C.* 458.

(*b*) *Ballingalls* v. *Gloster*, 3 *East*, 481.

(*c*) *Roscow* v. *Hardy*, 2 *Campb. N. P. C.* 458. 12 *East*, 434.

the

1816.

DUNN *against* O'KEEFFE.

the transgressing party, (and how could he confer a better title than he had himself) and who, by taking the bill unaccepted, must have done it upon the faith reposed in the party indorsing it, that he had done no act to discharge the security. The hardship, therefore, if there be any, ought to fall where the confidence was misplaced, and where the remedy lies immediately against the party who has abused it. As to any supposed inconvenience likely to result from the adoption of these arguments, it may be doubtful how far the unrestrained circulation of unaccepted bills ought to be placed to the account of public convenience, if, under that term, is comprehended a due regard to individual security. But however this may be, it is submitted, in the language of the learned Judge who dissented in the Common Pleas, "That as the law limits the responsibility of parties to bills of exchange, by certain rules for the negociation of them, those rules ought not to be varied by the introduction of new and unnecessary distinctions or exceptions."

Tindal, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. At a very late period, after the law-merchant, as it regards the subject of bills of exchange, had obtained for many centuries, the cases of *Blesard* v. *Hirst* and *Goodall* v. *Dolley* were decided. I do not mean to insinuate any thing against the authority of those decisions. They establish this, that if the party holding a bill of exchange, receive notice of its dishonour, he is bound to communicate this to the drawer. But it has not yet been determined that the want of notice operates further than a personal discharge

1816.

DUNN *against* O'KEEFFE.

charge of the drawer, as against the party failing to give the necessary notice, nor that an innocent indorsee shall be barred of his action by any latent defect in the transfer, or concoction of the bill, except in the two cases of the bill being given on a gaming or usurious consideration. The inconvenience of a more extended doctrine must be apparent; for, suppose the holder to be the eleventh person into whose hands an unaccepted bill has passed, in succession, by indorsement; the bill arrives at maturity, and is presented, in due course, for payment, and payment is refused, and notice is given to the drawer. According to the doctrine of to-day, the holder is not in a condition to maintain his action, unless he can steer clear of any vice which the bill may have acquired, by having been tendered for acceptance by some one of the numerous holders through whose hands it has passed. A long enquiry must be instituted through the whole series of indorsees, in order to ascertain if any previous presentment was made, and in what manner it was dealt with. Would it be possible to conduct the negociation of bills of exchange if all this investigation were necessary? What means has the holder of gaining this information? Must it be obtained by private enquiry? That, as it seems to me, would tend to cast, about bills of exchange, a precarious character, that would affect their credit, and, perhaps, totally exclude them from circulation. The cases of *Blesard* v. *Hirst* and *Goodall* v. *Dolley*, decided, that the *indorser* should be discharged, but that was as between the indorser and the party guilty of laches, which the plaintiff, in both those cases, was. It may be material to give the drawer notice, in order to enable him to withdraw his effects. This, therefore, may form a sound excep-

1816.

DUNN *against* O'KEEFE.

exception as against the party guilty of laches, but it is a very different consideration, whether it shall vitiate the bill in the hands of an innocent indorsee, like the cases of usury or gaming. It is argued, that the drawer is only conditionally liable, if the bill be dishonoured by non-acceptance or non-payment, provided he has notice. But it is no part of the condition, that he shall be discharged *quoad* every holder, if the dishonour be not within the knowledge of the holder. Such a position, I believe, is not laid down in any case, and would, as it seems to me, be carrying the doctrine further than is necessary or convenient, involving, perhaps, the negociation of bills of exchange in precarious uncertainty. The drawer who issues his bill into the world, without procuring its acceptance, is not without some degree of blame. He issues it in an imperfect state, and cannot justly complain of the neglect of any indorsee who takes the bill in this state, being cognizant of no circumstances to vitiate it, and looking merely at the names upon it. Upon the whole, it appears to me, that no authority has pronounced that a bill of exchange shall be a void security, in the hands of an innocent indorsee, who has no knowledge that the bill has ever been dishonoured, because a former holder has omitted to give notice to the drawer that the drawee has refused acceptance; and that such a doctrine would be destructive of the very policy and effect of this species of instrument, by rendering its credit of so precarious a nature, that no person would be found willing to trust to it, especially if a number of names were indorsed upon it.

BAYLEY J. I am of the same opinion. Bills of exchange being negociable instruments, a different rule applies

1816.

DUNN *against* O'KEEFFE.

applies to them, from that which governs ordinary instruments: so that an indorsee, *boná fide* and for a valuable consideration, may possibly stand in a better situation than the indorser. Usury and gaming form two exceptions to this, both affecting an innocent indorsee; and there is one other, where the indorsee cannot be said to be an innocent party, that is, where he takes a bill over-due, or where the bill bears on the face of it the mark of having been dishonored, as if it be noted for non-acceptance. In all other cases, although the want of notice may be a good defence, as against the indorser, it affords none as against an innocent indorsee. The drawer might avoid all difficulty, by drawing the bill payable to his own order, and procuring an acceptance before issuing it. If he draw it payable to a third person, and issue it in its unaccepted state, the imperfection lies at his door, and he must take the consequence. The question being whether the loss shall fall on him or upon an innocent indorsee, it seems to me, that the law casts it where it ought to fall. It is argued, that there is no hardship in casting the loss on the indorsee, because he received the bill on the individual credit of the indorser; but that argument, I think, is not supported by the premises, because an indorsee takes a bill, not upon the credit of the indorser alone, but of all the names which appear upon the bill.

ABBOTT J. I confess, it always appeared to me to be an anomaly, that the holder of a bill of exchange should not be bound to present it for acceptance, and yet, if he does present it, and acceptance is refused, that he should be bound to give notice to the drawer, under

 pain

1816.

DUNN *against* O'KEEFFE.

pain of having him discharged. To extend, however, the doctrine of discharge to a case like the present, would, in my opinion, be attended with very injurious consequences, as it would almost destroy the negociation of instruments of this nature; for no prudent person would take a bill of exchange, if it were to be subject, in his hands, to all such latent defects as the present. I am of opinion, therefore, that we ought not to extend the doctrine beyond the authorities cited.

HOLROYD J. I am of the same opinion, that there ought to be judgment for the defendant in error. This conclusion, I think, follows from some of the principles laid down in argument on the other side. I agree in the position that the drawer undertakes that the drawee shall accept and pay. If the holder tender the bill for acceptance, and acceptance is refused, he knows that the drawer is thereby defeated in his expectation; therefore, it becomes his duty to give notice to the drawer, and if he neglect this, he is guilty of laches, and ought to suffer for his negligence rather than the drawer. This was the ground on which the case of *Blesard* v. *Hirst* was determined. But such is not the present case, where the bill, in its unaccepted state, has passed into the hands of a bonâ fide indorsee to whom no laches is imputable. Upon the principle already laid down, the drawer, in such a case, holds out to the indorsee that the bill will be accepted and paid; and if this fails, ought he not to suffer rather than the indorsee who hath no knowledge whatever that the bill has been dishonored? The case of *Roscow* v. *Hardy* differs from this, because there the plaintiff took up the bill of his own wrong, after the holder by his laches had discharged the drawer and

prior

1816.

DUNN *against* O'KEEFFE.

prior indorsers, and therefore it was properly holden, that the plaintiff could not recover against a prior indorser. The greater part of the learned counsel's argument would apply to the case of a stolen bill, where the felon has indorsed it to a bonâ fide holder; but what says the law in such case? Not that the indorsee takes the bill on the individual credit of the felon, so that he must stand or fall by the felon's title, but that he shall recover on his own title, seeing that he might take the bill on the credit of all the names which appear on the bill. Usury and gaming considerations render the bill void in its original formation. I remember the case in *Douglas* (*a*), where the Court reluctantly yielded to that doctrine. This is not the case of a void bill; the indorsee is chargeable with no negligence, and I, therefore, think, that the drawer is still liable.

Judgment affirmed.

nt will

n end

(*a*) See *Lowe* v. *Waller*, *Doug.* 736.

YOUNG *against* ROWE.

Friday, June 28th.

In declaring against the acceptor of a bill of exchange, accepted *payable at a particular place*: Held, not necessary to aver a presentment at the place.

ASSUMPSIT. The plaintiff declares, that one *J. M.* on, &c., according to the custom of merchants, &c., made his bill of exchange, &c., and then and there directed it to the defendant, and thereby required him, two months after date, to pay to his (the said *J. M.*'s) order 300*l.*, for value in account, and then and there delivered the same to the defendant; which said bill of exchange the defendant afterwards, to wit, on the same day and year aforesaid, at, &c., *upon sight thereof*,

 accepted,

1816.

Young *against* Rowe.

accepted, according to the said custom of merchants, payable at Sir John Perring *and Co.'s, bankers,* London. And the plaintiff avers, that *J. M.* indorsed the bill to him, of which the defendant had notice, by reason of which premises, &c., the defendant then and there became liable to pay the sum of money specified in the bill, according to the tenor and effect of the said bill of exchange, and of his said acceptance, and of the said indorsement, and being so liable, &c.

Demurrer, assigning for cause, that, although it is alleged by the declaration that the said bill was accepted by the defendant, and made payable at Sir *John Perring* and Co.'s, bankers, *London*; yet it is not alleged, nor can it be collected from the declaration, that the said bill was ever presented, or shewn for payment, either when it became due or payable, or before, or since, at the said Sir *John Perring* and Co.'s.

drawer ider.
it becc
he neg *ford*, in support of the demurrer, cited *Saunderson*
for his *ves* (a), and put the case of an acceptor of a bill
the n the same footing with that of the maker of a pro-
d missory note; in which case it was holden, that the note must be presented at the place where it is made payable; and the reason given in that case applies as well to the acceptance of a bill of exchange, viz. because it forms part of the contract. How can the Court, upon demurrer, pronounce that it was not part of the contract, when the declaration alleges that the defendant accepted the bill, payable at a particular place? He referred, also, to *Gammon* v. *Schmoll* (b), and *Bishop* v. *Chitty*. (c)

(a) 14 *East*, 500. (b) 5 *Taunt.* 344. 1 *Marsh.*
(c) 2 *Str.* 1195.

Holt,

Holt, contrà, referred to a passage from *Pothier*, "that if a man accept a bill, payable at his own house, it is not a conditional acceptance."

Lord ELLENBOROUGH C. J. This demurrer raises the question upon which we have already pronounced our judgment (*a*), and upon which the Court of Common Pleas differ from this Court. Adhering to our former decision, we give judgment for the plaintiff, as there will be an opportunity of taking the opinion of a court of error.

BAYLEY J. It may be worth considering, whether an acceptance, payable at a particular place, is not according to the custom of merchants, for the convenience of the party to whom the acceptance is given. If this throws on the holder the obligation of presentment at the particular place, the want of such presentment will discharge all intermediate parties, there will be an end of this kind of acceptance.

HOLROYD J. referred to *Smith* v. *De la Fontaine*. (*b*)

Friday,

Per Curiam,

Judgment for the plaintiff. (*c*)

(*a*) See *Fenton* v. *Goundry*, 13 *East*, 459.

(*b*) *Bayley on Bills, by Barnes*, 129. *n*.

(*c*) See 2 *Brod*. 165., where this judgment was reversed in *Dom. Proc.*

1816.

Friday, June 28th.

RICHARDSON *against* GRIFFIN. (In Error.)

Counts for money lent and for money paid by plaintiff as assignee of a bankrupt, were joined with counts for money had and received to plaintiff's use, and upon an account stated with him, as assignee: Held, upon error after verdict, that these counts were well joined.

ERROR to reverse a judgment given for *Griffin* against *Richardson*, in the Common Pleas, at *Lancaster*, in an action in which *Griffin* declared, as assignee of one *R. W.*, a bankrupt, in indebitatus assumpsit: first, for money by the plaintiff as assignee as aforesaid, before that time lent and advanced to the defendant at his request; secondly, for money by the plaintiff as assignee as aforesaid, before that time paid, laid out and expended, to and for the use of the defendant, at his request; and, in the third and fourth counts, for money by the defendant before that time had and received, to and for the use of the plaintiff as assignee as aforesaid; and upon an account stated with the plaintiff as assignee as aforesaid, of and concerning divers sums from the defendant to the plaintiff as assignee, before that time due and owing. The defendant pleaded non assumpsit, and there was a verdict for the plaintiff for 372*l.*, and judgment thereon. And the error assigned was in the misjoinder of the two first counts with the two last counts of the declaration, the first and second being such as *Griffin* could not support in his character of assignee.

Parke, for the plaintiff in error, argued in support of this objection; and he took the rule to be this, that a plaintiff in one action cannot prosecute his own right and another's; and therefore, a count by the plaintiff as administrator cannot be joined with a count in his own right.

1816.

RICHARDSON *against* GRIFFIN.

right. (*a*) So, here, a count for money lent, or for money paid by *Griffin* in his individual character, cannot be joined with counts in his character as assignee. But the two first counts are nothing more than counts upon causes of action, accruing to *Griffin* in his individual character; for, except in the instance mentioned in statute 49 *Geo.* 3. *c.* 121., *Griffin* could not, in his character of assignee, dispose of the bankrupt's property by loan or otherwise; and the merely declaring that he did so as assignee will not alter the real nature of the counts. He might have declared upon the two first counts, without naming himself assignee (*b*); and, if so, they cannot be joined with the other counts in this declaration.

Scarlett and *Littledale*, contrà, argued that assignees of a bankrupt are not in all respects like executors, who act strictly as representing the testator; whereas assignees take the whole property of the bankrupt as it is assigned to them, and are for the time the real owners of it. Assignees may have trover as for their own goods; not so an executor. An executor is not liable to costs, therefore there is good reason for keeping distinct causes of action, which do not strictly belong to him as executor; but no such reason applies to assignees. Besides, the rule, as it respects executors, does admit the joining a count for money paid by the plaintiff as executor with, one for money paid by the testator (*c*); so that, if *Griffin* might lawfully as assignee

(*a*) *Rogers* v. *Cook*, 1 *Salk.* 10.

(*b*) *Evans* v. *Mann*, *Cowp.* 569. *Betts* v. *Mitchell*, 10 *Mod.* 315. *Hosier* v. *Lord Arundel*, 3 *Bos.* & *Pul.* 7.

(*c*) *Ord* v. *Fenwick*, 3 *East*, 104. *Cowell* v. *Watts*, 6 *East*, 405.

1816.

RICHARDSON *against* GRIFFIN.

have lent this money, these counts would, according to the above authority, be well joined. Now, that *Griffin* might so lend is apparent from the statute 5 *Geo.* 2. *c.* 30. *s.* 32., which empowers the bankrupt's creditors to give directions as to the manner, and how, and with whom, and where, the monies arising out of the bankrupt's estate shall be paid in and remain, and directs the assignees to conform thereto. So that the assignee may be compelled as such, by the creditors' directions, to lend.

Parke, in reply, observed, that any loan made by the assignees under the powers of the statute 5 *Geo.* 2., must be considered as made by them in their own right; for the statute indemnifies them for what they do in pursuance of the directions of the creditors.

Lord ELLENBOROUGH C. J. My impression during the greater part of the argument was, that these counts could not be joined; for I could not suggest to my mind any case in which the assignee of a bankrupt could become a lender. But, upon looking at the 5 *Geo.* 2. *c.* 30. *s.* 32., I find that it provides, "that the major part in value of the bankrupt's creditors shall direct in what manner, how, and with whom, and where the monies arising out of the bankrupt's estate shall be paid in and remain, until the same shall be divided among the creditors, to which direction every such assignee is to conform," &c. With this enactment before me, I am not satisfied that an assignee may not faithfully, and in his character of assignee, be concerned in an act of lending. For instance, suppose a lucrative trade going on, which must necessarily be stopped unless the creditors

1816.

RICHARDSON *against* GRIFFIN.

creditors authorise the assignee for a short time to make an advance of money by way of loan in order to secure its continuance; I am not satisfied that an assignee might not, under such circumstances, and with such authority, make a loan; and if he might, undoubtedly we must presume after verdict, if any one case can be stated in which a loan might lawfully be made, that such was this case. Not being prepared to say that a loan by an assignee of a bankrupt would, in every instance, be a contravention of his duty as assignee, I cannot pronounce in favour of this writ of error.

BAYLEY J. I agree that an assignee of a bankrupt cannot join counts in his own right with others in his right as assignee. In *Hancock* v. *Haywood* (a), it was decided, that the assignees of *A.* a bankrupt, and also of *B.* a bankrupt, under separate commissions, could not recover, in the same action, a joint debt due from the defendant to both the bankrupts, and also separate debts due to each; which shews that the assignee cannot recover, in the same action, that which belongs to the bankrupt's estate and that which belongs to him in another right. But, upon the statute, I think a possible case may be suggested in which it would be lawful for the assignee of a bankrupt to lend. There may also be a case in which the assignee may pay money for a third person. If so, these counts are well joined.

ABBOTT J. I entirely agree with my Brother *Bayley* in the distinction taken by him as to joinder in action;

(a) 4 *T.R.* 435.

and

1816.

RICHARDSON *against* GRIFFIN.

and that if no case could be put in which an assignee of a bankrupt could, in his character of assignee, properly make a loan, this declaration would be bad. But upon the extensive words of the statute already quoted, it appears to me a case may be supposed in which an assignee might properly enough make a loan; and there cannot be any doubt that he might, as such assignee, be obliged to pay as well as to account. I think, therefore, these counts are well joined.

HOLROYD J. In the first counts of the declaration, the plaintiff claims in the character of assignee; and to such claim must the causes of action be limited. Independently of the section of the statute referred to, and unless that section authorise a loan, I should have doubted if the counts were well joined; but, upon that section, I think that the assignees, instead of keeping the money themselves, may, with the authority of the creditors, lend it. If, then, such a cause of action may accrue to the plaintiff as assignee, we must intend that the jury gave their verdict on such a cause.

Judgment affirmed.

1816.

The KING *against* The Inhabitants of INSKIP-WITH-SOWERBY.

Saturday, June 29th.

An order of removal made upon complaint, that *M. S.*, the wife of *W. S.*, who is absent from her, is come to inhabit, &c., and is now with child, which is likely to be born a bastard, adjudging the said *M. S.* to be actually chargeable, was held sufficient in form, although the complaint did not state that the pauper was actually chargeable.

TWO justices removed *Margaret Sykes* from the township of *Inskip-with-Sowerby* to *Pilling* in *Lancashire* by the following order: "County of *Lancaster* to wit. — Complaint having been made by the churchwardens and overseers of the poor of the township of *Inskip-with-Sowerby* in the county of *Lancaster*, unto us two of his majesty's justices, &c. that *Margaret Sykes*, the wife of *William Sykes*, a soldier in the army, and absent from her, is come to inhabit in the said township of *Inskip-with-Sowerby*, not having gained a legal settlement there, nor produced any certificate owning her to be settled elsewhere; and that she is now with child, which is likely to be born a bastard, and that her last legal settlement is in the township of *Pilling* in the said county. We, the said justices, upon due proof made thereof, and likewise upon due consideration had of the premises, do adjudge the said *M. S.* to be actually chargeable to the township of *Inskip-with-Sowerby*, and do also adjudge her last legal settlement to be in *Pilling*." And then it proceeded to order her removal in the usual way. The sessions, upon appeal, quashed the order for insufficiency of form, because it was not stated in the *complaint, that the pauper was become actually chargeable*, subject to the opinion of this Court as to the validity of this objection. And now, the case being called on,

The Court, without hearing any argument, were of opinion, that the order of removal was sufficient; for the

1816.

The KING *against* The Inhabitants of INSKIP-WITH-SOWERBY.

the complaint states the premises from whence the conclusion necessarily arose under the act of parliament, (*a*) that the pauper was to be deemed chargeable, and the justices have drawn the conclusion.

Scarlett was to have argued in support of the order of sessions, and *J. Williams* against it.

Order of sessions quashed.

(*a*) 35 *Geo.* 3. *c.* 101.

Saturday, June 29th.

The KING *against* HOUGHTON.

The justices of the borough of *Liverpool* have authority to sentence, and to commit in execution of such sentence, to the house of correction for the county of *Lancaster*, an offender convicted before them at the borough sessions of petit larceny.

HOUGHTON was indicted as governor of the house of correction at *Preston*, in the county of *Lancaster*, for refusing to receive and imprison one *Richard Bruton*, who was apprehended in the borough of *Liverpool*, for petit larceny, and convicted of that offence, at the quarter sessions, holden in and for the said borough, and adjudged thereupon by the said Court, to be imprisoned in the house of correction for three months, and was committed by the said Court accordingly. Upon not guilty pleaded, a verdict of guilty was found, before *Le Blanc* J., at the *Lancaster* spring assizes, 1816, subject to the opinion of the Court upon the following case, with liberty to either party, by leave of the Court, to turn the same into a special verdict.

There are two houses of correction in and for the county of *Lancaster*, one at *Preston*, which was built and is supported by a rate upon the county of *Lancaster*, exclusive of the hundred of *Salford*; and the other at *Salford*, which was built under an act of parliament

passed

1816.

The King *against* Houghton.

passed for the purpose, and is supported by a rate upon the hundred of *Salford* only. The borough of *Liverpool* is a town corporate by prescription, and hath justices assigned to keep the peace in and for the borough, and also to hear and determine divers felonies, trespasses, and other misdemeanours there committed, and general courts of quarter sessions of the peace have been immemorially held within the borough, at which persons charged with petit larceny and misdemeanours have been tried. A court for the trial of civil actions, denominated the Mayor's Court, has also been immemorially held within the borough; and there has been, immemorially, a gaol within the borough, for the confinement of debtors under mesne process, and in execution, from the mayor's court, and also for the confinement of prisoners committed for trial by the justices of the borough, for offences done within the same, and also in execution of their sentences after trial at the quarter sessions, and the gaol has been and still is supported out of the funds of the corporation. On the 8th *August*, 1815, *Richard Bruton* was apprehended within the borough, for the felony mentioned in the indictment, committed by him within the borough, and was tried and convicted of the same felony at the general quarter sessions holden in and for the borough, on the 24th of *October* following, and by the judgment of the Court was sentenced to be imprisoned for three calendar months in the house of correction at *Preston*. He was accordingly conveyed, under a warrant made by the Court, to the house of correction at *Preston*, in pursuance of his sentence; and was there, with the warrant, tendered to the defendant, the governor, who refused to receive him. The parish of *Liverpool*, which was formerly

1816.

The KING *against* HOUGHTON.

formerly a township and part of the parish of *Walton*, but was separated therefrom, and made a parish of itself by act of parliament, in the year 1699, pays its proportion of the county-rate, including therein a portion applicable to the support of the house of correction at *Preston*. Until the year 1809, this proportion of the county-rate was paid by the treasurer of the corporation of *Liverpool* out of the corporate funds; but since that time, it has been, and is now, paid by the churchwardens and overseers of the poor of the parish, out of the poor's-rate, under an act of parliament passed 12 *Geo.* 2. In 1809, and at the time when this indictment was preferred, this proportion of the county-rate amounted to about 80*l.* per annum; but the assessment upon the parish, in respect of the rate, is now equal to the sum of 6200*l.* per annum, or thereabouts; and the proportion payable by the parish towards the maintenance and support of the house of correction at *Preston* for the last quarter, was 300*l.* and upwards. The inhabitants of the parish contribute to the county-rate through the medium of the poor's rate, in respect of their property lying within the same; and the corporation and its tenants, like other individuals, also contribute to the county-rate, in respect of its corporate estates lying as well within as without the limits of the parish. The parish and borough of *Liverpool* are co-extensive. The justices of the borough have not an exclusive jurisdiction within the same; nor have they any jurisdiction without the limits of the borough in the county at large, unless such jurisdiction is given to them in certain cases of acts of parliament, if any such there be. From the year 1784 to 1792, prisoners, in execution of their sentence for petit larceny and different offences, were occasion-

1816.

The KING *against* HOUGHTON.

occasionally sent by the quarter sessions of the borough to the house of correction at *Preston*, and were there received by the governor for the time being; and from 1792 to 1809, prisoners, in execution of their sentences, were sent by each court of quarter sessions held for the borough to the house of correction at *Preston*, and there received by the governor; but since 1809, such right of commitment by the quarter sessions has been, and still is, disputed. The justices for the county of *Lancaster*, since the passing of the 6 *Geo.* 1., have committed prisoners, convicted of petit larceny and other offences at the several courts of quarter sessions of the said county, to the said house of correction at *Preston*, in execution of their sentences. About the year 1776 a house of correction was built within the borough of *Liverpool*, by and at the expence of the said parish, the corporation contributing thereto 500*l.*, and the residue of the expence being defrayed by the said parish out of the poor's rate. From the time of its erection, until 1814, this house was used as a public house of correction for the borough, &c. the expence of supporting it was defrayed by the said parish out of the poor's rate. In 1814 the parish refused and discontinued to support it, or to permit it to be any longer used as a house of correction, and the building has never been since used as such; but has been, by the parish, converted into, and is now used as, a lunatic asylum for the parish paupers. Persons charged with petit larceny and other offences within the said borough, have, before trial at the borough sessions, been committed by the justices of the said borough to the said gaol within the borough until the year 1812; but since that time a considerable number have been committed by the justices of the said borough to the said house of correction

1816.

The KING against HOUGHTON.

tion at *Preston* for trial at the several courts of quarter sessions for the said county, and there received, and this right of commitment is not disputed.

The question for the opinion of this court was, whether the court of quarter sessions of the borough had authority to commit *Bruton* to the said house of correction at *Preston*.

This case was argued by *Richardson* for the crown, and by *J. Williams* for the defendant. The argument, on both sides, turned mainly upon the effect of the following statutes, viz. 5 *Ann.* *c.* 6. *s.* 2. which empowers the judge or justices before whom any offender is convicted of a clergyable larceny, to commit to the house of correction of the county, for not less than six months, and not exceeding two years; 6 *G.* 1. *c.* 19. *s.* 2., which enables justices of the peace, at their discretion, to commit vagrants and other criminals to the house of correction; 15 *G.* 2. *c.* 24., which authorises justices of liberties and towns corporate, whose inhabitants are contributory to the support of the county house of correction, where any person liable by law to be committed to the house of correction, is apprehended within the liberty or town corporate, to commit to the county house of correction; and, lastly, 53 *G.* 3. *c.* 162., which enacts, "That it shall be lawful for any court to pass upon any person, who shall be convicted before such court of felony, with benefit of clergy, or of any grand or petit larceny, the sentence of imprisonment to hard labour, either simply and alone, or in addition to any other sentence which such court shall be authorised by law to pass; and such person shall, thereupon, be imprisoned and kept to hard labour *in such place and for such time*, as such Court shall think

think fit to direct, not exceeding the time for which such courts may now imprison for such offences." Under these statutes it was contended for the crown, that the court of quarter sessions for the borough of *Liverpool* had authority to commit *Bruton* to the house of correction at *Preston*; that whatever doubts might have existed with respect to this authority before the 15 *G.* 2. were entirely removed by that act, and by the still more extensive statute of the 53 *G.* 3.; and that these enactments, which imparted to those who shared the burthen a portion of the benefit, were consonant both with reason and justice.

On the other hand, it was argued, that the authority exercised by the justices in this case was not well founded upon any of the acts cited; that the act of *Ann* was neither applicable to the offence of petit larceny nor to a period of imprisonment for three months; that of *Geo.* 1. was confined to vagrants or offenders of lower degree, and the act of *Geo.* 2. related only to the apprehension and commitment of offenders by single justices before trial; and not to their commitment in execution of a sentence passed by the justices sitting in quarter sessions. And, lastly, that the 53 *G.* 3. had for its object, to enable the Court to pass sentence of imprisonment to hard labour in the cases specified in the act, without reference to the house of correction, of which the act makes no mention, which it is impossible that it should have omitted to do, had its object been as contended for *contrà*.

Lord Ellenborough C. J. Whatever doubts might have pervaded this question previously to the statutes 15 *Geo.* 2. and 53 *Geo.* 3., I think are effectually re-

 moved

1816.

The King *against* Houghton.

so committed shall and may be received, dealt with, and kept to hard labour, and be subject to the same correction and punishment, to all intents and purposes, as if committed by any justice or justices of the peace of the county," seems to me to fortify the observation; because it speaks of a commitment which is to be for correction and punishment, whether made by any justice or by justices. And here we are aided by the language of the 5 *Ann.*, " judge or justices," which no doubt imports their being assembled as a court. Then we come to 53 *Geo.* 3., which extends this power of commitment to cases of petit larceny; for when the statute enables the Court in such case " to pass a sentence of imprisonment to hard labour," it does in effect authorise a commitment to the house of correction, although the house of correction be not named, that being the place peculiarly appropriate to imprisonment to hard labour. Combining, then, the effect of these three statutes, I think this case falls within them; and that the house of correction for the county is made subservient to the use of the contributory inhabitants of liberties or corporations, such as the town of *Liverpool*, for the commitment of persons apprehended within their limits, either for trial or after trial. Wherefore, it appears to me that the keeper of this house of correction was bound to receive the person thus sent to him.

Bayley J. I am of the same opinion. This offender was a county offender, although tried, for greater convenience, before a particular jurisdiction; still his offence was a county offence, and the place to which he was sentenced was the county house of correction, to the expence of which the borough of *Liverpool*, as being part

1816.

The King against Houghton.

part of the county, contributes; and therefore it was the house of correction for that borough, so far as the borough constitutes a part of the county. Looking at the several statutes of *5 Ann.*, 15 *G.* 2., and 53 *G.* 3. I think every difficulty is removed. It is argued, that the 15 *G.* 2. applies only to the commitment of persons before trial, and that it does not include the justices in quarter sessions. If any reason could be suggested why a distinction should be made between persons committed before and after trial, we might be led, perhaps, to this conclusion; but where there seems to be no reason, and the words of the act are general, applying equally to both cases, I cannot see why such a distinction should be made. And it is to be remembered, that this act is, as my Lord has observed, a declaratory act; so that the power of the justices to commit to the county house of correction where the borough is contributory to its support, must be taken as existing prior to the act, and to be confirmed by it. Then if we refer to the 53 *G.* 3. we find that statute applying to any court, and, as it seems to me, to houses of correction as well as other places. For the observation of my Lord, that although "house of correction" is not specified, yet it must have been contemplated, because that is the place peculiarly appropriate to the keeping of prisoners to hard labour, seems to me to be unanswerable.

Abbott J. I am of the same opinion. The imprisonment to hard labour, mentioned in the 53 *G.* 3. shews that the house of correction was a place of imprisonment contemplated by the act. I agree that the words "such place as the Court shall think fit," are not to be understood without any qualifi-

 cation;

1816.

The King *against* Houghton.

cation; but that they must be restrained to places to which the Court, either by common law, or by statute, had antecedently authority to commit. In this view of the case, the question is, whether the court of quarter sessions for the borough of *Liverpool* could have committed to the house of correction for the county, to the support of which the inhabitants of the borough were contributory, before the 53 *G.* 3. Now it is a general principle, that they who contribute to the burthen shall partake of the benefit. Therefore, I should strongly incline to think that, at common law, the justices of *Liverpool* might have committed to the county house of correction, unless they were, by their charter, expressly restrained to some place of imprisonment more peculiarly their own. But whatever doubt might have existed at common law, is removed by the stat. 15 *G.* 2. which was passed in order to give vigour to the principle above mentioned. It recites that doubts had arisen touching the commitment by justices of liberties to the houses of correction of counties, &c. though the inhabitants of such liberties contributed to the support of such houses. Therefore the contribution to the county rates is the principle upon which the act steps in to remove these doubts. An act founded on such a principle, surely ought to receive a large and liberal construction, whereas the construction contended for by the defendant is narrow and restrained. The word "justices" must, I think, be understood as meaning justices sitting in a court of sessions. I am of opinion, therefore, that there must be judgment for the crown.

Holroyd J. having formerly been engaged as counsel in the case, declined giving any opinion.

Judgment for the Crown.

1816.

The KING *against* HOUGHTON.

Saturday, June 29th.

The Justices of the borough of *Liverpool* have no authority to commit to the house of correction for the county of *Lancaster* a person convicted by them under the 51 G. 3. c. 143. (local and personal) of being a rogue and vagabond within the meaning of the 17 G. 2. c. 5.

THIS was an indictment against the same defendant, as in the last case, for refusing to receive one *Adam Lindsay*, who, as the indictment alleged, was apprehended within the borough of *Liverpool*, and there duly convicted, before two justices of the borough, of being a rogue and vagabond, within the stat. 17 *G. 2. c.* 5., for that it appeared to them upon oath, that the said *A. L.* was a person of evil fame and a reputed thief, and not able to give a satisfactory account of himself, and of his way of living, and also, for that it appeared to them upon such oath, that there was just ground to believe, *that the said* A. L., *at the time of his apprehension, was in the port and harbour of Liverpool, within the borough, with intent to commit felony on the* property of his majesty's subjects, contrary to the form of an act (*a*), intituled, "An act for the improvement of the port and town of *Liverpool*, &c.; and the said *A. L.* was adjudged by the said justices to be therefore committed to the house of correction at *Preston*, for one month, being a less time than until the next general quarter sessions for the county, and was conveyed, by warrant of the said justices, requiring the defendant to receive and keep the said *A. L.* for the said time, of which warrant the defendant had sight, &c. And the indictment also alleged, that before and at the time of the apprehension and conviction of the said *A. L.*, and from thence hitherto, the inhabitants of the borough of *Liverpool*

(*a*) 51 *G.* 3. *c.* 143. (local and personal)

1816.

The KING against HOUGHTON.

pool were and are contributory to the maintenance of the said house of correction: Plea, not guilty.

At the trial, before *Le Blanc* J., at the last Spring assizes, there was a verdict of guilty, subject to the opinion of the Court upon a case, which stated the facts alleged in the indictment, and was, in other respects, *mutatis mutandis*, similar to the last case. And the question for the opinion of the Court was, whether the justices of the borough of *Liverpool* had authority to commit to the house of correction at *Preston*, a person convicted before them, by virtue of the *Liverpool* dock act (51 *G.* 2. *c.* 143. local and personal) of being a rogue and vagabond, within the intent and meaning of the 17 *G.* 2. *c.* 5.

The argument urged by *J. Williams* against the authority of the justices, was, in substance, this: that the dock act was wholly of a local nature, having for its object local purposes, viz., the improvement and protection of the commerce and property of the inhabitants of the borough of *Liverpool*; that with this object the act creates a new species of vagrancy (*a*), over which the local magistrate alone has jurisdiction, and for which the offender is to be committed to the common gaol or house of correction of the borough (*b*), and an appeal lies to the borough sessions. And although, for offences within the 17 *G.* 2. *c.* 5. (vagrant act) the borough justices may commit to the county house of correction, and though the dock act enacts that the offender shall be deemed a rogue and vagabond, within the intent and meaning of the 17 *G.* 2., this must be understood only as designating the particular species of offence, not as enlarging the powers of the local magistrate

(*a*) s. 113. (*b*) s. 137.

to

1816.

The KING *against* HOUGHTON.

to commit. In addition to this argument, several clauses of the dock act (*a*) were cited and commented on, in order to shew, that its provisions were entirely local.

On the other side, it was argued by *Richardson*, that it being admitted that the borough justices had power to commit for offences within the 17 *G.* 2., to the county house of correction, it followed, that so soon as this offence became, by force of the dock act, an offence within the meaning of the 17 *G.* 2., the powers given by that act were vested in the borough justices, in the same manner as if those powers had been incorporated into the dock act.

Lord ELLENBOROUGH C. J. Almost every provision in the dock act seems to be local; the enquiry, the adjudication, the appeal, are all local; and here is a provision for committing the offender to the common gaol or house of correction of the borough. With respect to the language of the 113th section, "that such person shall be deemed a rogue and vagabond, within the intent and meaning of the 17 *G.* 2.," it seems to me, that this is meant only as it regards the nature of the offence and its punishment. Not only the appeal lies to the quarter sessions of the borough, but where a penalty is inflicted, it is also given to the Dock Company. The inhabitants of the borough, it is true, are contributory to the support of the county house of correction; but I see no reason why, on this account, where the offence is peculiarly and exclusively local, the power of commitment should be enlarged beyond the district affected by the commission of it.

(*a*) ss. 94, 103, 105, 116, 139.

BAYLEY

1816.

The King *against* Houghton.

Bayley J. I am of the same opinion. This man was nót a county offender, he was merely a borough offender. It would be placing the borough upon a better footing than the county at large, if the local magistrate had authority to commit to the county house of correction, in cases where the offence did not affect the county, but only the borough.

Abbott J. I am also of the same opinion. If this case had stood solely upon the clause, which enacts that the offender shall be deemed a rogue and vagabond, within the intent and meaning of the 17 G. 2., the argument would have had considerable weight. But, looking to the other provisions of the dock act, which are of a limited and local application, I think this is a case of vagrancy, in which the commitment must be to the house of correction for the borough.

Judgment for the Defendant.

Monday, July 1st.

Groome *against* Forrester, D. D. and Another.

A conviction by two justices under stat. 17 *G.* 2. *c.* 38., upon complaint of the overseers of a parish against the late overseer, for refusing and neglecting to deliver over to them a certain book belonging to the parish called *The Bastardy Ledger*, convicting him of the said offence, and adjudging that he should be committed to the common gaol, to be safely kept *until he should have yielded up all and every the books concerning his said office of overseer belonging to the parish*, was held void, as to the adjudication respecting the imprisonment, for excess, the same extending beyond what was previously required of the person convicted; and a warrant of commitment founded on this conviction, and directing the gaoler to keep him in the terms of the adjudication, was also holden void *in toto*, for which trespass and false imprisonment would lie against the justices, although the conviction had not been quashed.

TRESPASS for assault and false imprisonment against the defendants, justices of the peace for the town and liberties of *Wenlock*, in the county of *Salop*. Plea, not guilty. At the trial before *Holroyd* J., at the last

Salop

1816.

GROOME against FORRESTER.

Salop assizes, there was a verdict for the plaintiff, damages 5*l.* with liberty to the defendants to move to enter a nonsuit. A rule *nisi* for this purpose having been obtained, *W. E. Taunton*, (*Dauncey* with him) was heard against the rule on a former day in this term, and *Jervis* and *Puller* in support of it.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was a motion to set aside a verdict against the defendants, justices of the peace for the town and liberties of *Wenlock*, in the county of *Salop*, in an action for false imprisonment, and to enter a nonsuit. The imprisonment complained of was the commitment of the plaintiff to the common gaol at *Shrewsbury*, under the warrant of the defendants as magistrates, founded upon a conviction of the plaintiff as late overseer of the parish of *Broseley*, in that county; which conviction was had before the defendants, under the 17 *G.* 2. *c.* 38. against the plaintiff, for not delivering over to the succeeding overseers of the parish a certain book belonging to the parish, called the *Bastardy Ledger*, in breach of his duty under that statute, which required him to deliver over all such sums of money, goods, chattels, and other things, as should be in his hands, to such succeeding overseers. In case of his refusal or neglect so to do, the statute (*a*) authorizes two or more justices of the peace to commit him to the common gaol, until he shall have paid and yielded up such monies, goods, chattels, and other things in his hands. The conviction, as far as relates to the withholding of the particular book in question, the offence charged in the

(*a*) s. 2.

inform-

1816.

GROOME *against* FORRESTER.

information, is correct. After finding him guilty thereof it proceeds to adjudge that *Thomas Groome* (the plaintiff and late overseer) for his offence aforesaid, (that is, in not delivering over the particular book, *The Bastardy Ledger*,) be forthwith committed to the common gaol at *Shrewsbury*, to be safely kept, "until he shall have yielded up all and every the *books* concerning his said office of overseer, belonging to the said parish." That is the adjudication; and the warrant of commitment follow the adjudication, and of course directed the gaoler to keep *Groome* until he should have yielded up all and every the books concerning his office of overseer; thereby in effect casting upon the gaoler the function of enquiring and determining, what were "all and every the books concerning the office of overseer," upon the yielding up of which the gaoler was to discharge his prisoner, instead of requiring the gaoler to detain his prisoner, (as it should have done) until he should have yielded up the particular book specified and described in the information, and for the non-delivery of which he was convicted. Such a commitment was certainly not authorised either by the letter or the spirit of the act of parliament, and subjected the prisoner to the risk of an imprisonment for an indefinite period, viz. until he had complied with a condition of greater extent than was imposed by the act of parliament; and where the gaoler who should have to detain him under the warrant had no adequate means of judging, whether his prisoner should have, in fact, complied with the terms of such condition, and, of course, whether he was entitled to his discharge or not. This, it will be observed, is a conviction and commitment on the ground of a supposed contumacy; but the defendant could have been guilty of no contumacy in respect of the non-deli-

very

1816.

GROOME against FORRESTER.

very of any other book or thing, than that book which alone he had been required to deliver, viz. *The Bastardy Ledger*. The conviction and commitment, therefore, in respect of a supposed contumacy to any greater extent than that in which obedience had been previously required from him, must of course be unfounded. Previously to commitment for refusing to do a thing, there must have been a charge and proof, and the party cannot be committed "until he does something," which is not charged and proved upon him, that he has previously refused to do. Assuming that the warrant is in this respect illegal and void, the question is, whether it be therefore void *in toto*; and if it be, whether the defendants, as committing magistrates, are liable to an action of trespass and false imprisonment for having committed the plaintiff thereupon. And that it is void *in toto* the case of *Milward* v. *Coffin*, 2 *Bl. R.* 1331. is an authority; there *Gould* J., in the absence of *De Grey* C. J., said "It is fairly and candidly conceded, that if one of the rates be illegal, the whole warrant is bad; and I take the first to be illegal, for assessing the plaintiff beyond the extent of his occupation. All that related to the assessment of lands, not in the occupation of the plaintiff, was *coram non judice*; the justices therein exceeded their jurisdiction, and their determination is a nullity." In 2d *Inst.* 52. there are to be found several good rules in respect to commitments; the fifth of which is, "The warrant, or mittimus, containing a lawful cause, ought to have a lawful conclusion, viz. and him safely to keep until he be delivered by law, &c. and not until the party committing doth farther order." Likewise, in 2d *Inst.* 591. there is a farther rule; "Now as the *mittimus* must contain the cause, so the conclusion

must

1816.

Groome *against* Forrester.

must be according to law, viz. the prisoner safely to keep, until he be delivered by due order of law, and not until he that made it shall give other order, or the like." The case of *The Mayor and Churchwardens of Northampton*, *Carth.* 152., is a leading case, upon the proper form of conclusion of a commitment, until a particular act should be done by the party committed. That case was thus. The mayor of *Northampton* committed the churchwardens for refusing to account before him, and the warrant of commitment concluded in the common form, (viz.) "until they be duly discharged according to law;" and all this appearing upon the return to a *habeas corpus*, the Court held the commitment void, because the warrant ought to have been thus concluded, (viz.) there to remain until he shall account, as the statute 43 *Eliz. c.* 2. doth appoint. And the difference is, where a man is committed as a criminal, and where only for contumacy (as in this case,) in refusing to do a thing required, &c.; for in the first case, the commitment must be until discharged according to law; but in the latter, until he comply and perform the thing required; for in that case he shall not lie till a sessions, but shall be discharged upon the performance of his duty. Wherefore the churchwardens were discharged by rule of Court. *Bracy*'s case is an authority to the same effect; it is reported, in 5 *Mod.* 308., 1 *Salk.* 348., 1 Ld. *Raym.* 99.; also in the margin of *Carthew*, 153., from which I cite it. One *Braby* was committed by commissioners of the statute of bankrupts, for refusing to answer; and they concluded their warrant, that he be committed to prison, there [illegible]remain, "until he conform himself to our aut[illegible], and be thence delivered by due course of law;" [illegible] the return of a habeas corpus, he was discharged,

1816.

GROOME *against* FORRESTER.

charged, because this conclusion was not pursuant to the statute of bankrupts; and the mayor of *Northampton's* case was cited for an authority. In Lord *Raymond's* report, it is laid down, that if he had been committed "until he should conform to their authority, in the special matter, it had been good. And of that opinion was Lord *Holt*; and he said, that the word "submit" (which is the word in the statute, and not "conform") does not mean an act of humble submission, but only to make answer to the question proposed." In *Salkeld's* report, the Court held the word conform, instead of the word submit, to be well enough, because it was of the same sense; but because the commissioners had other authorities besides that of examining, and it did not appear but that it might require a submission to them in other respects, and for that all powers given in restraint of liberty must be strictly pursued, and in this case they had but a special authority, and must not exceed it, they held the return naught. *Yaxley's* case, *Carth.* 291. was "a commitment by the secretary of state, under the stat. 35 *Eliz.*, for refusing to answer whether he was a jesuit, &c., and on a habeas corpus, he prayed to be bailed. The exception to the commitment was, that the conclusion thereof, was "there to remain until he shall be from thence discharged by due course of law," when the words of the statute are, "until he shall answer unto the questions;" and therefore the commitment ought to be special, according to the statute; and the Churchwardens of *Northampton's* case was cited and relied on; and for that objection the Court held the commitment ill. Other cases might be cited to the same effect, such as *Rex* v. *Hall*, *Cowp.* 60. The foregoing cases are cases of discharge from commit-

ment,

1816.

GROOM against FORRESTER.

ment, on the ground of an illegality apparent on the face of the warrant. The two following cases, *Baldwin and Wife* v. *Blackmore*, 1 *Burr.* 595. and *Crepps* v. *Durden*, *Cowp.* 640., establish that in such case, that is, of warrants illegal upon the face of them, for an excess of jurisdiction in the magistrate, trespass is maintainable against the committing magistrate; and this was held in the latter case, although the conviction had not been quashed. In *Baldwin and Wife* v. *Blackmore*, a warrant to commit the wife, as an idle and disorderly person, for returning with her husband to the parish from whence removed, without a certificate, was holden to be void, and that trespass lay for the imprisonment under it. So, where the warrant ought to be to imprison for a month, and it is until discharged by due course of law. *Crepps* v. *Durden*, *Cowp.* 640., was a conviction in four penalties, for exercising his ordinary calling of a baker on a *Sunday*. As there can be but one offence on the same day, it was held an excess of jurisdiction, for which an action would lie before the convictions were quashed. There the question immediately before the Court was, whether an objection could be made to the legality of a conviction before it was quashed, and it was held that it might. Upon these authorities, and the reason of the thing, we are obliged to pronounce that the commitment made in pursuance of the said adjudication in this case, as well as the adjudication itself, in respect to the imprisonment, being, in this particular, a clear excess of jurisdiction, was not warranted by law, and that the imprisonment thereunder was a trespass in the committing magistrates, for which this action is maintainable; which we cannot but regret, as the facts of the

case

1816.

GROOME *against* FORRESTER.

case would have authorised a commitment, if the warrant had been framed in a manner conformable to the powers of the magistrates under the statute. The consequence is, that the rule *nisi* for setting aside the verdict, must be discharged.

EVERETT and Others *against* J. WHARTON, Esq.

Monday, July 1st.

Upon process by original writ against a member of parliament, the summons omitted to describe him as having privilege of parliament, and the notice at the foot stated, that in default of his appearance on the return day of the writ, plaintiffs would cause an appearance to be entered for him. Held, that the summons was sufficient.

THE defendant, being a member of parliament, was sued by original writ in a plea of trespass on the case, and was served with a summons returnable in five weeks of *Easter*, which omitted to describe him as *having privilege of parliament*, and the notice written at the foot informed him, *that, in default of his appearance, the plaintiffs would cause an appearance to be entered for him, and proceed as if he had himself appeared by his attorney.* The defendant having made default, the plaintiffs issued a distringas, and levied 40*s*. A rule nisi having been obtained for setting aside the distringas, and returning the issues levied under it, on the ground of these defects in the summons and notice,

The *Attorney-General* and *Marryat*, who shewed cause, contended that this being a proceeding by original writ, and not by bill and summons under stat. 12 and 13 *W.* 3. *c.* 3. the writ and process against a member of parliament might be the same as against other persons. For an original writ being the means of commencing all personal actions against every person, not an attorney or officer of the Court, or in the custody of the marshal, is not affected by the statute

1816.

EVERETT *against* WHARTON.

12 & 13 *W.* 3. or 45 *G.* 3. *c.* 124. *s.* 3. regulating the mode of proceeding against persons having privilege of parliament. And though some of the precedents by original, in the books of practice, describe the defendant as having privilege of parliament, others omit this description. Here the summons, which sets out the original, shews the day on which the writ is returnable, which is all that the defendant need know to provide for an appearance, and though the notice adds, that, upon the defendant's making default, the plaintiffs will enter an appearance for him, this will not vitiate the process.

Raine, contrà, contended that the plaintiffs, by omitting the words "having privilege of parliament," had misled the sheriff to serve the defendant with a different summons and notice from that to which by privilege he was entitled.

But, *per Curiam*, the law does not require the insertion in the summons of the words "having privilege of parliament;" and their insertion would have made no difference to the defendant, as to the time or manner of his appearance. The concluding part of the notice, that, in default of the defendant's appearing, the plaintiffs would cause an appearance to be entered for him, is not a sufficient ground of objection to make void the process.

Rule discharged.

HUTTON *against* BEUBEN.

Monday, July 1st.

In order to found proceedings against the bail in the action, the *ca. sa.* must be entered in the book at the sheriff's office, kept there for that purpose.

UPON a rule *nisi* for setting aside proceedings against bail in the action, on the ground that search had been made at the secondaries' office, and that there was no entry in the book usually kept for that purpose, of a *capias ad satisfaciendum* against the principal.

F. Pollock shewed cause upon an affidavit, stating, that there was an entry of the writ in the secondaries' book, wherein writs are entered, on which warrants are granted.

Topping and *Lawes*, in support of the rule, contended, that in order to fix the bail, a *ca. sa.* must be sued out against the principal, and must be lodged at the sheriff's office four days, which must be the four last days before the return (*a*). The object of this is to give the bail notice of the species of execution intended to be pursued; and therefore entries are made in the book kept for this purpose, to which the bail may resort in order to obtain notice: consequently an entry in the sheriff's private book, kept for a different purpose, and which cannot be accessible to the public without defeating its own object, could be no notice to the bail in this case.

Lord ELLENBOROUGH C. J. The book in which this writ was entered was certainly intended for information

(*a*) 2 *Salk.* 599.

1816.

HUTTON *against* BROOKS.

for another purpose. The rule (*a*) requiring that the writ should lie in the sheriff's office four days before the return, must mean that it should be so lodged as that notice thereof should be accessible to the bail.

Per Curiam, Rule absolute.

(*a*) *Reg. E.* 5. *G.* 2.

NABB *against* SMITH.

A defendant who is sued by bill as an attorney, not being such, may set aside the proceedings as irregular.

UPON a rule *nisi* for setting aside proceedings for irregularity, on the ground that the defendant, not being an attorney, was sued by bill as such.

J. Williams resisted the rule, urging that it was competent to the defendant to plead in abatement, in like manner as an attorney may plead his privilege in abatement, if he be not sued by bill. (*a*)

Campbell, in support of the rule, denied that there was any precedent for the defendant's pleading in abatement, as suggested, the practice being, in cases like the present, to relieve on summary application.

Lord ELLENBOROUGH C. J. The defendant is only brought into Court upon process founded upon a supposition of his being present in Court. The process, therefore, is irregular.

Per Curiam, Rule absolute.

(*a*) 6 *T. R.* 524., *Barber* v. *Palmer*. 7 *Taunt.* 166., *Duffy* v. *Oakes*.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-Seventh Year of the Reign of GEORGE III.

1816.

MEMORANDA.

On the first day of this term, the following gentlemen took their seats within the bar.

Mr. Serjeant *Onslow*, having been appointed one of His Majesty's Serjeants learned in the law.

Samuel Marryat and *John Gurney*, Esquires, having been appointed of His Majesty's counsel learned in the law.

1816.

Saturday, November 9th.

Doe, on the Demise of James and Wife, *against* Harris.

Devise to trustees in fee, in trust to permit *A. H.* to receive the rents and profits for life; remainder to *W. H.* in tail; remainder to *J. S.* in fee: Held, that a fine with proclamations, levied by *W. H.* to a stranger in the lifetime of *A. H.*, was void; and, therefore, the heir of *J. S.* was not barred by non-claim and want of entry.

In ejectment, the premises being described as in the parish of *Westbury*, and it being proved that there were two parishes of *Westbury*, viz. *Westbury on Trym* and *Westbury on Severn*: Held, that this was not a variance.

EJECTMENT for lands in the parish of *Westbury*, in the county of *Gloucester*. At the trial before *Richards B.*, at the last *Gloucester* assizes, the case was this:

Henry Harris being seised in fee of the lands in question, devised the same to trustees in fee, in trust to permit *Anne Harris* to receive the rents and profits for her life, and after her decease, to *Wintour Harris* in tail, remainder to *J. S.* in fee. The testator died: *Wintour Harris*, in the lifetime of *Anne*, by lease and release, conveyed the lands and the reversion, &c. and all the estate, &c. of him, the said *Wintour*, together with all deeds, &c. to the defendant's father in fee, and covenanted to levy a fine *sur conuzance de droit come ceo*, &c. which was accordingly levied with proclamations. *Anne Harris* died, and the defendant's father entered, and was possessed. Afterwards *Wintour Harris* died without issue; and lastly the defendant's father died, and the defendant entered, and was possessed. And this ejectment was brought by the heir of *J. S.*, after more than five years from the death of *Wintour Harris*.

The objections made at the trial were these: 1st, Non-claim for five years; 2dly, The want of an entry to avoid the fine; 3dly, A descent cast. The learned Judge over-ruled these objections, being of opinion that it was a void fine. Another objection was, that the lands were described in the declaration as being in the parish

parish of *Westbury*, whereas it was proved, that there were two parishes of that name in the county, viz. *Westbury upon Trym* and *Westbury upon Severn*; in which latter the lands were situate. This objection was also overruled, and a verdict passed for the plaintiff.

1816.

Doe dem. James against Harris.

Dauncey now moved to enter a nonsuit, renewing these objections; and in support of the latter, he relied upon the distinction taken in *Doe* v. *Salter* (a), where the lands being described as in the parish of *Farnham*, instead of *Farnham Royal*, the Court held it well, there being no other *Farnham*. But here it appears there are two *Westburys* in the county.

Lord ELLENBOROUGH C. J. The conusor of the fine not having any seisin, the fine consequently could not operate to pass an interest. As to the objection arising from the description of the parish, it does not appear to me that there is any variance which could mislead; if it had described the parish as *Westbury upon Trym*, it would have been different. But all that is here predicated of the parish on the record is, that the premises lie in the parish of *Westbury*, and so they do.

BAYLEY J. There was not any interest in possession in the conusor at the time of the fine levied; therefore, it could only operate by way of estoppel. As nothing was divested, and put to a right by this fine, an entry was not necessary to avoid it. (b) In *Doe* v. *Salter*, the name of the parish was properly *Farnham Royal*, and not *Farnham*.

(a) 13 *East*, 9.

(b) See 9 *Rep.* 106. a. 3 *Mod.* 196. *Roe d. Truscott* v. *Elliot*, 1 *B. & A.* 85.

1816.

Doe dem. James *against* Harris.

Abbott J. I think there was not any variance. In common language the addition is not used.

Per Curiam, Rule refused. (*a*)

(*a*) See *Ld. Raym.* 33. *Tipping* v. *Cozens*.

Tuesday, November 12th.

The Trustees of the Liverpool Docks *against* Gladstone and Another.

By the *Liverpool* dock act, 51 *G.* 3. *c.* 143. (Local and Personal), a ship which cleared outwards from that port to *St. Domingo*, where she discharged her cargo, reloaded for *London*, and there discharged that cargo, loaded again for *Liverpool*, and arrived there with the last-mentioned cargo, was held liable to pay a dockage rate according to the rate payable from *London* only, and not from *St. Domingo*.

ERROR to reverse a judgment given in the Court of Pleas at *Lancaster* for the plaintiffs, *Gladstone* and *Murray*, against the trustees of the *Liverpool* docks, in assumpsit for money had and received, to which the defendants pleaded the general issue; and, at the trial, a special verdict was found, in substance as follows:

Before and at the time of passing the act 51 *G.* 3. *c.* 143. (Local and Personal), for the improvement of the port and town of *Liverpool*, and amending the several acts relating to the docks, &c. the plaintiffs were, and still are, the owners of the ship *Richard*; which ship was built at *Whitby*, in *Yorkshire*, and was, and still is, registered at, and belonging to, the port of *Liverpool*. This vessel, before the passing of the 51 *G.* 3., had traded outwards from the port of *Liverpool* on a certain voyage, and had paid the duty on such outward trading, under the provisions of the former act relating to the *Liverpool* docks; and at the time of passing the 51 *G.* 3. was absent from *Liverpool* on that voyage; and after-wards

1816.

Trustees of the LIVERPOOL Docks *against* GLADSTONE.

wards returned from her voyage, and traded inwards to the port of *Liverpool*, and on that occasion paid no dock-rate or duty. Afterwards she was loaded at the port of *Liverpool* with a cargo for *St. Domingo*, and cleared outwards from *Liverpool* for *St. Domingo*, no dock-rate or duty being then paid for her; and she discharged her cargo at *St. Domingo*, and was loaded there with another cargo for *London*; and discharged that cargo at *London*, and was there loaded with another cargo for *Liverpool*, with which she arrived at *Liverpool*, bringing with her a coast-dispatch, and there discharged that cargo. The defendants insisted upon receiving, and did receive, a dock-rate or duty from the plaintiffs, in respect of the vessel, at the rate of 2*s*. per ton, amounting to 34*l*. 10*s*., being the *St. Domingo* rate of duty, which was paid by the plaintiffs, to prevent a distress upon the vessel or her tackle. The vessel was afterwards loaded at *Liverpool* with another cargo for *Madeira*, and cleared outwards and sailed with it from *Liverpool* to *Madeira*, from which voyage she has not yet returned. The action was brought to recover 24*l*. 8*s*. 9*d*., being the difference between the *St. Domingo* rate and the *London* rate, payable under the 51 *G*. 3.; and judgment having passed for the plaintiffs below, the defendants brought their writ of error, and assigned the common error.

This case was argued at the sittings at *Serjeants-Inn*, before this term, by *Richardson* for the plaintiffs in error, and by *Joy* for the defendants. The argument, on both sides, turned on a critical examination of several of the clauses of the act 51 *G*. 3. *c*. 143., particularly the 6th and 7th. For the trustees of the docks it was argued, that the *St. Domingo* rate was payable, by reason that

 the

1816.

Trustees of the LIVERPOOL Docks *against* GLADSTONE.

the ship had, during her absence from *Liverpool*, traded to *St. Domingo*, which was, therefore, to be taken as the most distant port of her voyage; to which it was answered, that the port of *London* was the most distant port from which the ship had traded to *Liverpool*. In the course of the argument, the case of *Geldart* v. *Gladstone* (a) was referred to.

Lord ELLENBOROUGH C. J. My view of this subject is very much governed by what I consider the plain and obvious sense of the 6th section, which is not capable of any misunderstanding, unless by confounding it with some of the terms in the 7th section, which I own I am not equally able to understand. The 6th section provides, that "all vessels which shall arrive at the port of *Liverpool*,"— and this vessel arrived at *Liverpool*, — "and trade inwards," — and this was a trading inwards, — "shall be liable to pay the dockage-rates fixed by this act, according to the rates payable from the most distant port or place from which they shall so trade to *Liverpool*." Now, there may be a trading to *Liverpool* which embraces a variety of ports; for instance, this ship might have arrived at *Liverpool*, after having been at *St. Domingo*, in one continued course of trading. But it is not so in the present case; for it appears there has only been a trading from *London* to *Liverpool*, since no part of the *St. Domingo* cargo was carried to *Liverpool*, the cargo with which the ship arrived at *Liverpool* being only a *London* cargo, unmixed with any portion from any other place. Therefore, the words of this clause, "according to the rates payable from the most distant

(a) 2 *Taunt.* 97. 11 *East*, 675.

port,

1816.

Trustees of the LIVERPOOL Docks *against* GLADSTONE.

port," do not apply to this case; because there is but one single act of trading from one port, namely, the port of *London*; and it cannot be predicated of any port, where there is but one, that it is the most distant: so that the words, " shall be liable to pay according to the rates payable from the most distant port," can only apply where there is a means of comparing distance between different ports. Then, by referring to the 5th section, the tonnage-duty payable on a voyage from *London* seems clearly to be ascertained. Certainly, the language of the 7th section, which regulates the payment of the tonnage-rate for one arrival, together with one departure of each ship, — " without any regard to any intermediate ports between which she may have traded whilst absent from *Liverpool*; but that such tonnage-rate shall, in every such case, be charged upon every such ship, upon the most distant voyage to which such ship shall have traded," — throws a doubt upon the case; because the ship, whilst absent from *Liverpool*, has traded to *St. Domingo*. This language, however, may be understood as speaking of any intermediate ports in the ship's voyage to *Liverpool*; and if this be so, it does not interfere with the present case, because *St. Domingo* was not in the ship's voyage to *Liverpool*. And, that the 7th section relates to one unbroken voyage inwards, appears, I think, from the 12th section, which was passed to prevent evasion in making a true report of the ship's destination. That section enacts, " that whenever any person shall apply to make payment of any dock-duties in respect of any ship's arriving at, or sailing out of the port, it shall be lawful for the collector to question him as to the most distant port from which such ship has arrived and traded to *Liverpool*," &c. Now, sup-

 pose

1816.

Trustees of the LIVERPOOL Docks *against* GLADSTONE.

pose the person applying to make payment in this case had been questioned as to the most distant port from which the ship arrived and traded to *Liverpool*, would he not have answered truly that he had arrived and traded from *London?* The power of examination is given for the purpose of ascertaining, in every instance, what duty is payable; and here the answer would, with truth, have been, that the ship had only traded from *London*. It appears to me, therefore, that coupling this clause, which gives a power of examination, with the other clause, and finding that the true answer to the question, as to the most distant port from which this ship had arrived and traded, would be *London*, it is plain that no other duty than the *London* duty was payable. The right construction may be collected from the 6th and 12th clauses combined; and if this be so, the *St. Domingo* duty has been improperly received, and the judgment ought to be affirmed.

BAYLEY J. I think the judgment ought to be affirmed. Considering that this act imposes a charge upon the subject, we ought to see that it has used sufficient words to raise the charge; and if it is defective in this particular, it is the fault of those by whom the charge was intended to be raised. The 5th section imposes a tonnage-duty according to different classes of voyages, and among others, "to or from the port of *Liverpool* and the *West Indies*;" but when this ship sailed from *St. Domingo*, her destination was *London*, not *Liverpool*. Her clearing outwards from the port of *London* was the commencement of her voyage and trading to *Liverpool*. The act has no words to attach on this ship a *Liverpool* voyage, until she left *London*. The 6th section uses lan-

1816.

Trustees of the LIVERPOOL Docks *against* GLADSTONE.

language which plainly indicates the scheme of the legislature in charging the tonnage-rates. In the case of ships arriving at *Liverpool* and trading inwards, it imposes a rate according to the class of rates payable from the most distant port from which each ship so trades. This makes it necessary to enquire, in every case, what the voyage is in which the ship has been engaged in her trading to *Liverpool*. In the present case, the answer is, that the trading was from *London*, at which port she took in her cargo for *Liverpool*. We find a similar regulation, in the same section, in respect of ships trading outwards; if the ship arrive at *Liverpool* in ballast, or be built within the port, and trade outwards, she is chargeable with the rate payable to the most distant port of her trading outwards. According to the 11th section, a change in the mode of collecting the rates was to take place, the rates which had before then been paid on clearing outwards being, for the future, to be paid on entering inwards; whence it might happen that the same would be diminished, if the ship entered inwards from a neighbouring port, and cleared outwards to a distant one. It is probable that the 7th section had this in view when it provided, that only one rate should be payable for one arrival, together with one departure, of each ship; but that such rate should be charged upon the most distant voyage or place to which the ship should have traded. Mr. *Richardson* has argued as if this were to be understood of any trading, without reference to *Liverpool*; but it seems to me that the clause cannot be construed thus indefinitely, but must mean such a trading as by the 6th section is made chargeable with a duty, — that is, a trading inwards to *Liverpool*, or outwards from *Liverpool*. And this,

1816.

Tuesday, November 12th.

D. Harvey and Others, Assignees of M. B. Harvey and J. W. Harvey, Bankrupts, *against* Crickett and Others.

Where one of two partners, who were country bankers, became bankrupt, and defendants, being holders of their notes, obtained payment of part of them from the *London* banker, at whose house they were payable, out of the funds in their hands belonging to the country bank, and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to defendants, in payment of the residue of the notes in their hands, and afterwards became bankrupt: Held, that the assignees could not recover from defendants the monies so paid to them by the *London* banker, nor the proceeds of the said bill.

ASSUMPSIT for money had and received, to the use of the plaintiffs as assignees, second count declaring as assignees of the bankrupt, *J. W. Harvey*. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after last *Michaelmas* term, a verdict was found for the plaintiffs, with 951*l.* 15*s.* 6*d.* damages, subject to the opinion of the Court on the following case:

The plaintiffs are assignees of *M. B.* and *J. W. Harvey*, who carried on business, in the year 1814, as bankers and partners at *Rochford* and *Billericay*, in *Essex*, under the firm of *Matthew Barnard Harvey*, Son, and Co., and used the house of *Ramsbottom* and Co., as their *London* agents. The defendants, in the same year, carried on business as bankers and partners at *Chelmsford*. On the 17th of *May* of that year *J. W. Harvey* committed an act of bankruptcy, and on the 23d, a docket was struck against him; and the following day a separate commission issued, under which he was declared a bankrupt. At the time of *J. W. Harvey*'s bankruptcy, the defendants held notes of *Harvey*, Son, and Co., payable to bearer, which had come to their hands in the course of their business as country bankers, to a large amount. These notes were afterwards presented by one of the defendants to *Ramsbottom* and Co., at whose house they were payable, when payment was refused; but afterwards a part of them, to the amount of 30*l.* or 40*l.*, was pre-

sented

1816.

HARVEY *against* CRICKETT.

sented by the direction of the same defendant, and paid by *Ramsbottom* and Co., out of the funds of *M. B.* and *J. W. Harvey*, then in their hands. With this exception, *Ramsbottom* and Co. continued to pay all the notes of *Harvey*, Son, and Co., presented to them for payment, to the amount of many thousand pounds, until the 23d of *June*, up to which day *M. B. Harvey* continued to carry on the business of the bank in the country. Before the 22d of *May*, the defendants had notice that a considerable number of the bankrupts' notes had been refused payment, and on that day they were informed, by a son of *M. B. Harvey*, that *J. W. Harvey* had absconded, but that his father, *M. B. Harvey*, was perfectly solvent, unless transactions of which he was ignorant came to light. On the same day, an application was made to them on behalf of *M. B. Harvey*, to accept, in payment of the notes which had been refused by *Ramsbottom* and Co., a bill to be drawn by one *Wade*, a debtor to *Harvey*, Son, and Co., to a larger amount than the proposed bill. The defendants agreed to take the bill, and accordingly *M. B. Harvey*, who at that time knew that *J. W. Harvey* had absconded, procured *Wade* to draw a bill upon *Dyson* and *Dixon* for 1000*l.*, at two months, payable to *M. B. Harvey*, or order. The bill was drawn on the 24th of *May*, and delivered by *Wade* to *M. B. Harvey*, in part satisfaction of the debt due from *Wade* to *Harvey*, Son, and Co., The son of *M. B. Harvey*, who acted for him on this occasion, dictated the form of the bill; and the reason for making it payable to *M. B. Harvey* alone was, because he thought that every thing devolved on him, upon *J. W. Harvey*'s absconding. On the same day, the bill was indorsed by *M. B. Harvey*, and delivered to the

1816.

HARVEY *against* CRICKETT.

the defendants on account of the said notes. The bill, when due, was paid by the acceptors to the defendants. On the 23d of *June*, *M. B. Harvey* committed an act of bankruptcy, and on the 18th of *July*, a joint commission issued against both the bankrupts, and the plaintiffs became assignees under the same. On the 9th of *September*, the separate commission against *J W. Harvey* was superseded. The sum for which the verdict was found was the amount of the proceeds of the bill, and the portion of the notes paid by *Ramsbottom* and Co. to the defendants; and the question for the opinion of the Court was, whether the plaintiffs were entitled to recover the whole, or any part thereof.

This case was argued, at the sittings at *Serjeants' Inn* before this term, by *F. Pollock* for the plaintiffs, and *Tindal* for the defendants.

The argument for the plaintiffs was in substance this, —that by the bankruptcy of one partner, followed by a commission and assignment, the partnership is dissolved (*a*): whence it follows, that the remaining partner, who has notice of the act of bankruptcy, cannot dispose of the partnership-property. For, by the bankruptcy, the property in the joint effects is changed, being vested in the solvent partner, in common with the assignees of the bankrupt-partner, who are bound to distribute these effects *pari passu;* which obligation might be defeated, if the solvent partner had the power of disposing of them in discharge of debts as he pleased. If, indeed, the act of bankruptcy be secret, so that the

(*a*) *Hague* v. *Rolleston*, 4 *Burr.* 2174. *Thomason* v. *Frere*, 10 *East*, 418.

other

1816.

HARVEY *against* CRICKETT.

other partner has no knowledge of it, this seems, according to the decisions (*a*), to form an exception; and, in such cases, the solvent partner has been allowed to dispose of the joint effects. But those decisions do not apply to the present case. Wherefore, the plaintiffs are entitled to the whole of the money paid to the defendants; and, if not to the whole, at all events to a moiety, they having declared as assignees of *J. W. Harvey*, as well as assignees of both the partners. (*b*)

For the defendants it was answered, — that as by the bankruptcy of *J. W. Harvey* his assignees became, as it was admitted, tenants in common with *M. B. Harvey* of the partnership-effects, this action would not lie against the defendants, who claimed under *M. B. Harvey*, no more than it would lie against *M. B. Harvey* himself. According to Lord *Mansfield*, in *Fox* v. *Hanbury* (*c*), "the assignees could only be tenants in common of an undivided moiety, subject to all the rights of the other partner." *Non constat*, that the other partner might not be a creditor of the partnership to ten times the value of all the effects; and this could only be ascertained by an account, to be taken between the partners in a court of equity. Before this was ascertained, if *M. B. Harvey* had himself received the money paid by *Ramsbottom* and Co., or the debt due from *Wade*, how could the assignees have recovered against him, seeing that these monies were as much his property as theirs? And if *M. B. Harvey* would not have been liable in that

(*a*) *Fox* v. *Hanbury*, *Cowp.* 445. *Smith* v. *Stokes*, 1 *East*, 363. *Smith* v. *Oriell*, *ib.* 369.

(*b*) *Smith* v. *Goddard*, 3 *Bos & Pul.* 465.

(*c*) *Cowp.* 449. Also, per *Holt* C. J., 12 *Mod.* 446., and per *Ld. Hardw.*, in *West* v. *Skip*, 1 *Ves.* 239., recognized in *Taylor* v. *Fields*, 4 *Ves.* 396.

case,

1816.

HARVEY *against* CRICKETT.

case, no more shall the defendants, who are the same with *M. B. Harvey*, be liable in this. Supposing, however, this action to be maintainable, *Smith* v. *Goddard* is an authority that no more than a moiety shall be recovered.

Lord ELLENBOROUGH C. J. I think, in this case, the action is not maintainable; and that the doctrine which has been urged to-day, that the bankruptcy of one partner is, to all purposes, a dissolution of the partnership, has been pushed to an extent which the law does not warrant. For future purposes, it may operate as a dissolution, so as to prevent the solvent partner from dealing with the partnership-property as if the partnership continued; but most certainly he has a lien on the joint funds in his hands, in respect of all claims which were consummate at the time of the bankruptcy. In this case, the solvent partner has applied part of those funds in satisfaction of such a claim; and to take the money out of his hands, or those of the defendants, may be to his prejudice, before the account is taken between the partners. It seems to me, that until the account is taken, and it is ascertained whether the assignees are entitled to recover a balance against the solvent partner, this action is premature. To entertain this action would be pregnant with all the inconveniences that would attend an action upon an unliquidated account between partners.

BAYLEY J. I am entirely of the same opinion. If this action is maintainable, the consequence would be, that after an act of bankruptcy committed by one partner the partnership-house must immediately be closed;

but

1816.

HARVEY *against* CRICKETT.

but such a consequence is directly contrary to the cases of *Fox* v. *Hanbury* and *Smith* v. *Oriell*. If several persons enter into partnership, either for a definite or an indefinite time, each partner is at liberty to apply the joint funds in payment of the partnership debts; and each has a lien on those funds for his own indemnity, limited to their being applied to the payment of partnership debts. When one of several partners becomes bankrupt, he puts himself by that act out of the partnership, and ceases to have any further controul over the partnership property: the whole of his rights pass to his assignees. But this does not prevent the remaining partners from exercising the controul which rests with them over the property, to take care that it is duly applied in liquidation of the partnership debts. If this were not so, in what a situation would the solvent partners be placed. For if, in this case, a creditor had applied to *M. B. Harvey* for payment of a partnership debt, and he were precluded by the bankruptcy of *J. W. Harvey* from paying it, the consequence would be, that having funds of the partnership in his hands fully sufficient to satisfy the demand, he must nevertheless become liable to arrest and to be detained in prison. And the creditor also would be in this dilemma, that having funds to look to for the discharge of his debt, he could not obtain payment, because he could not properly receive what the other was unable to pay. The solvent partner would say that he was liable to account with the assignees of the bankrupt partner, and thus leave the partnership creditor unpaid. This seems to me to be a consequence, the inconvenience of which is sufficiently obvious. It is argued that a distinction is to be made in the present case, because both *M. B. Harvey* and the

1816.

HARVEY *against* CRICKETT.

defendants were aware of the act of bankruptcy; but I ask, whether this was not a bonâ fide payment to a person who was entitled to receive it? If it were, the knowledge which they possessed of the act of bankruptcy does not, as it seems to me, distinguish the case from those of *Fox* v. *Hanbury* and *Smith* v. *Oriell*. In *Smith* v. *Oriell*, Lord *Kenyon* considered that the whole, and not a moiety only, of the partnership property, delivered by the solvent partner in satisfaction of a partnership debt, passed by the transfer.

ABBOTT J. I take the case to be this, that *M. B. Harvey*, the solvent partner, knowing that the other partner had committed an act of bankruptcy, applied the partnership effects in discharge of a partnership debt. Now, there is no doubt that the partnership effects were liable in some way or other to this demand; but it has been contended, that the power of the solvent partner to dispose of the partnership effects in this way ceased by the act of bankruptcy. The inconvenience of such a consequence has been well pointed out by my Brother *Bayley*, and struck me in the early part of the argument; but, however great the inconvenience, it could not avail against the law, if there were authorities to shew it. But so far from this being the case, I own I think the authorities are the other way. I consider it as plainly deducible from the case of *Fox* v. *Hanbury*, that a solvent partner, without notice of the bankruptcy of the other partner, may lawfully dispose of the partnership property. In *Smith* v. *Oriell*, I do not find it stated negatively that the solvent partner had not notice; and I should rather infer from the case that he had, because it states that a commission of bankruptcy had issued before

1816.

HARVEY *against* CRICKETT.

before the time when the transfer was made. But it does not appear to me that a knowledge of the fact makes any difference: the legal right cannot result from the absence of knowledge. If a solvent partner is not at liberty, after the bankruptcy of one partner, to apply the partnership funds to the discharge of partnership debts, he may be ruined in the midst of abundance of property capable of paying all the debts; and the creditors, also, must wait until such time as assignees are chosen, and it is their pleasure to make distribution. It appears to me, that the effect of one partner's bankruptcy is, to deprive him of the power of disposition, and to vest in his assignees a right to such surplus as the bankrupt himself would have had; but, nevertheless, the partner who has not committed an act of bankruptcy retains his power of disposing of the partnership effects, in payment of the partnership debts. If this power were exercised with a view of giving a fraudulent preference, it would lead to a different conclusion; but fraud is not stated, and cannot be intended. As far as any intendment can be made, I should infer the contrary; for it seems that *M. B. Harvey*, supposing he was of ability to discharge all the partnership debts, went on as long as he could, until he found his hopes disappointed.

HOLROYD J. I am entirely of the same opinion. It appears to me that knowledge of the bankruptcy makes no difference. It is not stated, that it was in the contemplation of *M. B. Harvey*, or of the defendants, that *M. B. Harvey* would become a bankrupt, which would have been a material fact to distinguish this from the other cases. I apprehend the bankruptcy of *J. W. Harvey* did not avoid or diminish the lien which *M. B. Harvey*

 had

1816.

HARVEY *against* CRICKETT.

had upon the partnership effects; and if it did not, it follows, that no person could have claimed to take the effects out of his hands, until after an account taken, which must be taken in equity. If, then, *M. B. Harvey* had a lien, for what purpose was this lien but for the purpose of paying the partnership debts, and protecting his own rights? How does the bankruptcy of *J. W. Harvey* alter the *jus disponendi* of his partner to this extent? It seems to me that it makes no difference in this respect. It is contended, that this action may be supported either for the whole or for a moiety. As to the latter, it cannot be maintained, except on the ground that one partner may sue for his moiety. But can it be contended, that if money, which is the joint property of the partners, be received by a third person, one of the partners may sue him, and recover his moiety? If not, neither can it be contended in favour of his assignees. This is money paid by a solvent partner, in discharge of a partnership debt, which by law he was bound to pay. It appears to me this action is not maintainable on either ground.

Judgment for the defendants.

LEADBITTER *against* FARROW.

Tuesday, November 12th.

An agent to a country bank, to whom plaintiff sent a sum of money, in order to procure a bill upon *London*, drew in his own name for the amount upon the firm in *London*, the two firms being the same: Held, that the agent was liable as drawer, although plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money.

ASSUMPSIT upon a bill of exchange and the money counts. Plea, non-assumpsit. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after last *Hilary* term, there was a verdict for the plaintiff, damages 50*l*., subject to the opinion of the Court upon the following case:

The plaintiff and defendant, at the time of drawing the bill in question, resided at *Hexham*. The defendant, who was a tanner, was also agent of the *Durham* bank, in which capacity he acted from *July*, 1812, to *July*, 1815, when the bank failed. On the 8th of *June*, 1815, the plaintiff sent 50*l*. to the house of the defendant, in order to procure a bill upon *London* for the amount, and the defendant filled up and signed the bill in question upon one of the printed forms of the *Durham* bank, and sent it to the plaintiff. The following is a copy of the bill:

"N. G. 205.

50*l*. *Hexham*, *June* 8th, 1815.

Forty days after date, pay to the order of Mr. *Thomas Leadbitter* fifty pounds, value received, which place to the account of the *Durham* bank, as advised.

Messrs. *Wetherell*, *Stokes*, *Mowbray*, *Hollingsworth*, and Co. bankers, *London*.

(Signed) *Christr. Farrow*."

The persons who constitute the firm upon which the bill was drawn, are the same who constitute the firm of

 the

1816.

LEADBITTER *against* FARROW.

the *Durham* bank, that bank having a house in *London*, upon which they were in the habit of drawing bills, which they wished to make payable there.

The bill in question was drawn in the same form as had been used by the defendant since *June*, 1813, before which time he had been in the course of issuing bills drawn in the name of one of the partners of the *Durham* bank. He did not draw bills on his own account in this form, nor u on the same parties. The plaintiff, when he sent the 50*l*., and obtained the bill, knew that the defendant was agent of the *Durham* bank at *Hexham*, and that the *Durham* bank drew upon a house in *London*, and he supposed that the bill was given by the defendant, as agent, and on account of the *Durham* bank, to which the defendant paid over the 50*l*. The bill, when due, was presented to the drawees, and payment refused, and due notice was given to the defendant.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Tindal, for the plaintiff, argued, that the defendant was liable, there being nothing on the face of the bill to shew that it was drawn by him as an agent who was acting only for his principal. The defendant, in order to protect himself, should have expressed on the bill, that he drew it as agent only, or by procuration; or at least that it was *for* the *Durham* bank; for the expression, "to be placed to the account of the *Durham* bank, as advised," imports nothing more than that the drawer had a credit with the *Durham* bank to the amount, and that the drawees were to look to that credit. So, where a bill was addressed to the drawee *as cashier of the York Building's Company*, at their house, and was accepted by him

him generally, it was held that he was personally answerable, notwithstanding the bill was addressed to to him in a limited character. (*a*) As to the plaintiff's knowledge that the defendant was only an agent, it is to be recollected that this is a contract in writing, founded on the custom of merchants, which cannot be varied by matter lying in parol *dehors* the instrument. (*b*) Therefore, upon a policy of assurance from *Archangel* to *Leghorn*, where the defendant sought to shew by parol, that the risk was to commence only from the *Downs*, it was pronounced by *Pemberton* C. J., "That a merchant should no more be allowed to go from what he had subscribed in a policy, than he that subscribes a bill of exchange payable at such a day shall be allowed to go from it, and say it was agreed to be on condition, &c." (*c*) And surely the defendant cannot go from that which he has here subscribed in a more important particular than if he be allowed to say that the plaintiff knew him to be an agent only, and therefore he is not answerable. Besides, it does not follow, because the plaintiff knew him to be an agent, that the defendant is, therefore, exempted from personal liability. Contracts are frequently made by persons who are known to be agents, yet are personally liable. (*d*) The defendant, therefore, in order to exempt himself, ought to shew, not only that the plaintiff knew him to be an agent, but that he also understood that the defendant was not to be answerable *ultrà*; whereas the contrary is apparent from the case; for if the defendant be not liable, no one else is: the drawees are not, for they have not ac-

(*a*) *Thomas* v. *Bishop*, *Str.* 955. (*b*) *Ibid.*

(*c*) *Kaimes* v. *Knightley*, *Skinn.* 54.

(*d*) *Appleton* v. *Binks*, 5 *East*, 148. *Le Fevre* v. *Loyd*, 5 *Taunt.* 749.

1816.

LEADBITTER *against* FARROW.

cepted; nor the *Durham* bank, for there is nothing in writing to bind them; and as the *Durham* bank and drawees were identified, it may well be intended that a second name was added as drawer, to give the bill additional currency.

Scarlett, contrà, endeavoured to distinguish the cases cited for the plaintiff. As to *Thomas* v. *Bishop*, he observed, that the plaintiff had no knowledge of any agency, except as far as it might be inferred from the bill's being addressed to the drawee as cashier, which the Court considered as only descriptive of the party; for, though a cashier, he might well accept on his own account; and the rest was merely local reference: but it is remarkable that the Court, upon that occasion, referring to a case in *Carth.*, took the present distinction, saying, "It might have been otherwise if the action had been by *J. S.* who was privy." And what was there said as to the non-admissibility of matter *dehors* the writing, was said only as it regarded any matter to charge third persons, *i. e.* the *York Building's* Company. But it is the daily practice to admit evidence explanatory of written contracts, in order to shew the real nature of the transaction; as that a bill of exchange was drawn for accommodation, or by a servant only. With respect to the personal liability of agents, upon contracts in which they are known to act as agents, it is observable, of the two authorities quoted in favour of this position, that in one the plaintiff had no knowledge that the defendant drew the bill as agent; and the other was a case of covenant. And as to the argument for the necessity of this defendant's liability, drawn from the supposed irresponsibility of any other party, it may be answered, that

the

1816.

LEADBITTER *against* FARROW.

the *Durham* bank is liable, in the same manner as ship-owners are liable upon a charter-party, not under seal, executed by the master on their behalf.

Lord ELLENBOROUGH C. J. Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly, "I am the mere scribe," he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the *Durham* bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not so done, and, therefore, has made himself liable. I do not say whether an action would lie against the *Durham* bank, because, considering it in either way, it would not, as it seems to me, affect the liability of the defendant.

BAYLEY J. I am entirely of the same opinion. The drawer, by the act of drawing, pledges his name to the bill's being duly honoured; and though the plaintiff in this case knew that the defendant was an agent, he might also know that he had given this pledge.

ABBOTT

1816.

LEADBITTER *against* FARROW.

ABBOTT J. I am also of the same opinion. The party does not shew that the bill was not taken according to the effect which it bears on the face of it.

HOLROYD J. I apprehend that no action would lie on the bill, except against those who are the parties to it.

Judgment for the Plaintiff.

Tuesday, November 12th.

PATTEN and Others *against* THOMPSON.

The unpaid vendor may stop *in transitu* before the goods come to the hands of the vendee's factor, although the factor has the bill of lading, indorsed to order, in his hands, and is under acceptance to the vendee on a general account, wherefore, in such case, where the vendee became bankrupt, and the factor also became bankrupt, and the messenger under the factor's commission, upon the arrival of the ship, went on board, and seized the cargo, the agent of the vendor having previously given notice to the captain to deliver the cargo to him, and the captain having agreed thereto. Held, that trover would lie by the vendor against the assignee of the bankrupt factor.

TROVER for 108 tons of wheat. Plea, not guilty. At the trial, before *Le Blanc* J., at the *Lancaster Lent* assizes, 1815, there was a verdict for the plaintiffs, damages 3000*l.*, subject to the opinion of the Court, upon a case, which stated, that the plaintiffs were merchants at *Westport*, in *Ireland*, that *Hickman* and Co. were merchants at *Dublin*, and that the defendant was the provisional assignee of *Hodgson* and Co., bankrupts, who were merchants at *Liverpool*. On the 28th *May*, 1814, the plaintiffs wrote to *Hickman* and Co., informing them that they had that day commenced loading the brig *Amlwch*, of *Beaumaris*, *Owen* master, with wheat, and of which they made them an offer, " say about 100 tons our best wheat, kiln dried, screened, and free on board, at 34*s.* 6*d.* per barrel, of

20 stone,

1816.

PATTEN *against* THOMPSON.

20 stone, payable by our bill on yourselves, at three months' date, from the date of bill of lading." On the 30th *May*, *Hickman* and Co. wrote to the plaintiffs in answer, accepting the offer, and requesting to be advised in time, to have an insurance effected. On the 6th *June*, the plaintiffs inclosed to them the invoice and bill of lading for 108 tons, and drew upon them for the price, by three bills to their order, amounting to 1502*l.* 0*s.* 4*d.*, which *Hickman* and Co. returned on the 8th, accepted. The case then set forth a series of letters between *Hickman* and Co. and *Hodgson* and Co., as follows.

"*Hickman* and Co. to *Hodgson* and Co., 30th *May*, 1814. You have inclosed a bill of lading for 360 barrels of wheat, shipped on board the *Content*, Captain *Wilson*. You will please make the necessary insurance. *You will also effect insurance on* 100 *tons of wheat, shipped at* Westport, *on board the brig* Amlwch, *of* Beaumaris, J. Owen *master:* this vessel is now in port, and ready for sailing."

"*Hodgson* and Co. to *Hickman* and Co, 4th *June*. The bill of lading, per *Content*, is received, *and the insurance effected on wheat, per* Amlwch, *from* Westport, *particular of which is annexed.* The two bills inclosed in yours of the 1st instant, amounting to 2584*l.* 5*s.* 6*d.* are to your credit, and the three drafts advised of, together 1550*l.*, shall meet due honour."

"*Hickman* and Co. to *Hodgson* and Co., 6th *June*. Inclosed you will receive, *Atkinson* and Co. on *C.* and *S. Hays*, 200*l.*; *R. Banfield* on *F. Banfield*, 500*l.*; our draft on *A. Atkins*, 876*l.* 4*s.*, which please put to our credit. We have valued on you to

"*Hugne*,

1816.

PATTEN against THOMPSON.

		£.
" *Hugne, Beauman*, and Co.	-	500
" *Thomas Abbott*, in three bills,	-	1200
" *Samuel Matthews* -	-	200
" *John Tomlinson* -	-	400
" *Denis Mulan* - -	-	40
" *Lyndon, Bolton*, and Co.	-	1000

" To which please shew honour."

" *Hodgson* and Co. to *Hickman* and Co., 10th *June*. We wrote to you on the 8th, and are since favoured with yours of the 6th instant, inclosing three drafts, amounting together to 1576*l.* 4*s.*, which we placed to your credit. Your six drafts, together 3340*l.*, shall meet due honour, according to your advices. Inclosed are account sales of wheat, per *Fanny*, the net proceeds, 1245*l.* 19*l.* 3*d.*, are to your credit, as are also your sales per *Clyde*, amounting to 1080*l.* 3*s.* 10*d.*, herein handed you."

" *Hickman* and Co. to *Hodgson* and Co, 8th *June*. We inclose three bills, amounting to 1581*l.* 7*s.* 6*d.*, to the debit of your account: *you have also inclosed a bill of lading for* 804 barrels *of wheat shipped at* Westport, *on board the* Amlwch. There is no fresh corn coming to market all over the kingdom: the growing crops of both oats and wheat look very badly, particularly the former. Since our last advices we valued on you as follows; viz. in three drafts, to

		£.	s.	d.
" *N. Mahon* -	-	700	0	0
" *J. Hills* -	-	182	9	10
" *Williamson* and Co.	-	2000	0	0"

" *Hodgson*

1816.

PATTEN *against* THOMPSON.

" *Hodgson* and Co. to *Hickman* and Co., 11th *June*. We are favoured with yours of the 8th instant, inclosing three bills, 1581*l.* 7*s.* 6*d.*, which are placed to your credit: it also inclosed bill of lading for wheat, per *Amlwck*, which shall have our best attention on arrival. Your three drafts for 2882*l.* 9*s.* 10*d.* shall meet due honour."

On the 2d *June*, *Hodgson* and Co. effected an insurance in their own names, on the wheat in question, for 1300*l.*, in pursuance of the letter to them of the 30th *May*, and on the 8th *June* the *Amlwch* sailed for *Liverpool*, with the wheat on board. By the bill of lading the wheat was made deliverable at *Liverpool*, to *Hickman* and Co. or assigns, and it was indorsed by them, to be delivered to *Hodgson* and Co., or order. On the 15th of *June Hickman* and Co. advised the plaintiffs, that, in consequence of several extensive failures in which they were involved, they found it impossible to make good their engagements. A circular letter to the same effect was at the same time sent by *Hickman* and Co., to their principal creditors and correspondents. *Hickman* and Co. stopped payment on or about the 15th *June*, and continued insolvent until their bankruptcy, which took place shortly after. On the 21st *June* a commission of bankruptcy issued against *Hodgson* and Co. The several bills drawn by *Hickman* and Co. on *Hodgson* and Co. were accepted by the latter, and have been proved under their commission. The plaintiffs, on receipt of *Hickman* and Co.'s letter of the 15th *June*, immediately sent one of their clerks to *Liverpool* with one of the bills of lading, and with a power of attorney, authorizing their agent there to stop the goods *in transitu*. The clerk arrived at *Liverpool* on the 20th *June*, and found the *Amlwch*, which had arrived two days before

1816.

Paine against Thompson.

before him, lying with the wheat on board, in the *Mersey*. On the same day she came into *George's* dock basin, *Liverpool*, and in the afternoon the under warehouseman of *Hodgson* and Co. went on board for the purpose of taking a sample, but was refused by the mate, (the captain not being then on board, and having left express orders with the mate that the hatchways should not be opened,) whereupon he returned, and the head warehouseman went on board and told the mate (the captain being still absent) that he came from *Hodgson* and Co., the consignees, and wanted a sample, in answer to which the mate communicated to him the captain's orders; but upon the warehouseman replying that the next day was market day, and they wanted it to be shewn at the market, the mate permitted the hatchways to be opened, and a sample to be taken. On the 21st *June* the plaintiffs' agent exhibited the bill of lading and power of attorney to the captain, and required delivery of the wheat to be made to him on behalf of the plaintiffs, and the captain signed an undertaking upon the bill of lading, not to deliver the wheat to any person but the agent, he agreeing to pay the captain the freight, and guarantee him and his owners from any expense. On the 22d the agent gave the captain a bond of indemnity, and paid him his freight. On the evening of the 23d, the *Amlwch* having got into a proper birth to discharge her cargo, the messenger, under the commission issued against *Hodgson* and Co., took possession of the ship and cargo, and several days afterwards opened the hatchways, discharged the cargo, and delivered it to the defendant, who caused it to be sold by auction. The case further stated, that *Hickman* and Co., during the years 1813 and 1814, up to the time of their stopping payment,

1816.

PATTEN *against* THOMPSON.

payment, had been in the habit of consigning goods to *Hodgson* and Co., to be sold by them, as factors for *Hickman* and Co., and had also remitted to and drawn bills upon *Hodgson* and Co., which they accepted, and that the account between them was a running account; that at the time of the transmission of the bill of lading in question, and of the failure of *Hodgson* and Co., they were under acceptances for *Hickman* and Co. to a larger amount than that of the bills and goods remitted to them; but that, in consequence of their failure to make good part of their acceptances, the balance was in favour of the estate of *Hickman* and Co. The acceptances so dishonoured, including the three bills mentioned in the letter of *Hickman* and Co. of the 8th *June*, were proved under the commission of *Hodgson* and Co., and dividends received thereon, but the balance still remains in favour of the estate of *Hickman* and Co. The question was, whether the plaintiffs, under the circumstances stated, had a right to stop the wheat *in transitu*.

The case was argued at the sittings at *Serjeants' Inn*, before this term, by

Richardson, for the plaintiffs, and *Joy*, for the defendant. The authorities chiefly relied on in favour of the plaintiffs were *Kinloch* v. *Craig* (*a*), *Feise* v. *Wray* (*b*), and *Oppenheim* v. *Russell* (*c*): those for the defendant were *Lickbarrow* v. *Mason* (*d*), *Cuming* v. *Brown* (*e*),

(*a*) 3 *T. R.* 119. 783.
(*b*) 3 *East*, 93.
(*c*) 3 *Bos. & Pul.* 42.
(*d*) 2 *T. R.* 63. 1 *H. Bl.* 357. 5 *T. R.* 367. 2 *H. Bl.* 211. 5 *T. R.* 683.
(*e*) 9 *East*, 506.

Haille

1816.

Patten *against* Thomson.

Haille v. *Smith* (*a*), *Wright* v. *Lawes* (*b*), and *Virtue* v. *Jewell*. (*c*) The Court went so fully into the arguments in delivering judgment, as to preclude the necessity of a further detail.

Lord Ellenborough C. J. This is an action by *Patten* and Co., who are the sellers of a quantity of wheat, against the defendant, the provisional assignee under a commission against *Hodgson* and Co., merchants at *Liverpool*. The action is in other words by the *Westport* house, against the representative of the *Liverpool* house, to recover the value of this wheat, which was consigned by the *Westport* house, the unpaid sellers, to the *Dublin* house, the buyers, and by the *Dublin* house made deliverable to the *Liverpool* house for the purpose of sale, on account of the *Dublin* house. And the question is, in what character, and with what rights, the *Liverpool* house received this cargo. The relation subsisting between the parties is to be collected from a long correspondence that passed between them, and is set forth in the case. If it is to be taken, that the cargo was consigned to the *Liverpool* house, as a security for advances made by them, this may afford a ground for their claim, to detain the same until such time as they are indemnified against these advances, or the responsibility they have contracted in respect of the cargo. But the case, as it now stands, seems to me to go farther, and that the defendant, in order to succeed in his claim, must make out this position, that wherever a principal consigns goods to his factor for sale, and is at the same

(*a*) 1 *Bos. & Pul.* 563. (*b*) 4 *Esp. N. P. C.* 82.
(*c*) 4 *Campb. N. P. C.* 31.

time

1816.

PATTEN *against* THOMPSON.

time in a course of drawing on the factor upon account, this single circumstance of there being mutual credits between them, does of itself give to the factor a right, not merely to detain such consignments as shall come to his hands, but to anticipate the possession, and keep it against the unpaid seller. If there had been any specific pledge of this cargo in the course of the transaction, if bills had been accepted by the *Liverpool* house on the credit of this particular consignment, or if it had been so stipulated, this would have been a different case. But it appears from the whole transaction, that this is a mere naked case of a factor, to whom a quantity of wheat is consigned for the purpose of being sold by him, and who is to account for the sale, and render the proceeds to his principal. In such a case, if the factor has received the proceeds, he will be entitled to his lien upon them, to the extent of his indemnity, but he can have no rights antecedently to possession in respect of the consignment, but such as he has in his representative character of factor, in order to effectuate the object of the consignment. Now, let us consider what were the rights of the *Liverpool* house as against the *Dublin* house. On the 30th of *May*, the *Dublin* house wrote to the plaintiffs, ack [illegible] their letter of the 28th, making an o[illegible]ns of prime wheat, free on board at 1*l.* 14*s.* 6*d.* per barrel, payable by the plaintiffs' drafts on the *Dublin* house, at three months from the date of the [illegible] and informing them that [illegible] time, it is plain that the bill of lading, if it had any existence, had not reached the *Dublin* house; and indeed it appears not to have been forwarded to them until the 6th of *June*, when it was inclosed with the invoice for 108 tons

1816.

PATTEN *against* THOMPSON.

tons of wheat, and bills were drawn on them for the amount, which they accepted and returned to the plaintiffs. But I find by a letter from the *Dublin* house, of the same date with that in which they accept the plaintiffs' offer, that they directed the *Liverpool* house to effect an insurance upon this purchase. The letter relates to other matters as well as this, which shews that this was nothing more than an ordinary transaction between the parties, as principal and factor. No mention is made, that the bill of lading should be sent to them, to hold as a pledge on this particular account: this letter only contains the common instructions, as between principal and factor, to take charge of the cargoes specified, and insure them. The next letter between the same parties is of the 6th of *June*, remitting bills to the credit of the *Dublin* house, to the amount of 1576*l.* 4*s.*, and valuing upon the *Liverpool* house by several bills to the amount of 3340*l.*, but not a word of the consignment by the *Amlwch*, or that this is done on the credit of it; so that it is plainly an account current between them. Then comes a letter of the 8th of *June*, in the first place, inclosing three bills amounting to 1581*l.* 7*s.* 6*d.*, to the debit of the account of the *Liverpool* house. Here then is a remittance to be set against their former drafts; the letter also incloses the bill of lading for the wheat on board the *Amlwch*; and then proceeds to other matters of a general nature, and of account, but does not intimate that the *Liverpool* house should hold this bill of lading until their balance was satisfied. There is, therefore, no specific pledge of the cargo; by possession, they would undoubtedly have acquired a lien upon this consignment, but there is nothing to pledge by anticipation

the

1816.

PATTEN against THOMPSON

the bill of lading as a security; the letter imports that the bill of lading was sent to them in their capacity of factors. Although it goes on to inform them, that the *Dublin* house, since their last advices, had valued on them to a further amount, of 2882*l.* 9*s.* 10*d.*, there is not one word that the valuing was on the credit of the bill of lading. Thus stands the correspondence which accompanied the drafts and the bill of lading in question; and I would ask, whether there is a syllable throughout the whole touching a security, or any thing like a particular appropriation of this bill of lading to any specific draft, or balance? This case has been likened to that of *Haille* v. ....., but I think it bears no resemblance to it. That was a specific pledi by indorsement and delivery of the bill of ladi

be held as a collateral security. The case was this: there were two houses of trade in *London*, constituted by the same persons under different firms, the one a mercantile house, under the firm of *Smith* and *Atkinson*, the other a banking house, under the firm of *Smith*, Sons, and Co.; the latter of which having a correspondent of the name of *Browne*, who desired an extension of credit upon their house, it was agreed between them, that *Browne* should be at liberty to draw 5000*l.* weekly, for a limited period, to cover which amount, he was to remit them good bills on *London*, and as a further security, to lodge a credit in their favour with two houses at *Hamburgh*, to the amount of 20,000*l.*, and also, (which is material to be noticed,) as a collateral security, to consign to the house of *Smith* and *Atkinson* a cargo of hemp and iron for sale on his account; in pursuance of which agreement, the invoice and bill of lading

1816.

PATTEN *against* THOMPSON.

lading indorsed were remitted to *Smith* and *Atkinson.* Now, upon this statement I would repeat the question, whether there is any mention of a security, or a collateral security in the present case, or that the *Liverpool* house were to be placed in a relation to this cargo, to entitle them to any thing *ultra* their rights as factors? For I admit, that an agreement similar to that in *Haille* v. *Smith* would have varied the situation of these parties, considered as principal and factor, and made them contractors on a special account, and with reference to distinct securities. I apprehend, however, not a word of this kind is to be found in the case. In *Haille* v. *Smith*, it was considered by *Eyre* C. J., that the consignment to *Smith* and *Atkinson* was not merely to sell for the benefit of the consignor, but upon trust, that the proceeds should remain with *Smith* and *Atkinson*, by way of indemnity to the banking house. Again I ask, is there one word here about an indemnity to the *Liverpool* house? If not, it is plain that a lien can only attach on property in possession; until the party is possessed he can have no lien, and must be content to run the common risk, but when once he is lawfully possessed, he may retain until satisfied. Thus the case, as it appears to me, stands with respect to that of *Haille* v. *Smith*, upon which so much reliance has been placed. I have also looked into the case of *Vertue* v. *Jewell*, and find that there the bill of lading was indorsed, and sent by the consignor on account of a balance due from him, including several acceptances then running, so that it was in the nature of a pledge to cover these acceptances. There is nothing of the kind in this case: the bill of lading was transmitted for the purpose of enabling the factors to sell, without any reference to a loan or

balance

1816.

PATTEN *against* THOMPSON.

balance due to them. It seems to me, that this case distinctly falls within the authority of *Kinloch* v. *Craig*: there, as here, the cargo was sent to *Sandiman* and Co., the factors, who at the time of its arrival were under acceptances on this very account. The bill of lading, it is true, was unindorsed, and so far the fact differs; but the judgment of *Ashhurst* J. goes the full length of this case, for he denied that as between principal and factor merely the factor has a lien till he has obtained possession of the thing which is the object of the lien. And therefore he said, "If *Sandiman* had once got the possession, they then might have insisted on their lien." With respect to the indorsement of the bill of lading, if it be made to the party merely as factor, I conceive it carries his rights no farther, being made for the benefit of the principal. Now it cannot be argued here, that this indorsement of the bill of lading was not made to the *Liverpool* house, in furtherance of the duties to be performed by them as factors. But when an alteration of circumstances takes place, whereby the factors are no longer capable of performing those duties, can their assignees claim to have the consignment which was made to the factors in respect of a personal confidence reposed in them, for the performance of those duties which their assignees cannot execute? It is impossible, in the altered situation of things, that such a claim can be good. It seems to me, that this is neither the case of a pledge by way of security for advances made, nor of an assignment of the bill of lading, except for the purpose of enabling the factor to receive the property, and carry it to the account of his principal; that here, the unpaid vendor is not deprived of his right, in consequence of the failure of the vendee, to

 stop

1816.

Patten *against* Thompson.

stop *in transitu*; and therefore these plaintiffs are entitled to judgment, they having done all in their power to stop the cargo by laying claim to it; which was frustrated only by the messenger under the commission of *Hodgson* and Co. seizing the cargo in spite of the captain's undertaking to hold it for the plaintiffs; and I am not aware of any authority which clashes with this case thus considered.

Bayley J. I am of the same opinion. Two points seem to me to be clear; 1st, that the unpaid seller has a right, before the goods reach the purchaser, who has become insolvent, to stop them *in transitu*; next, that these plaintiffs did what amounts to a stoppage *in transitu* before the property arrived at its destination. The only question is, as to the claim of the *Liverpool* house, who derive title under the *Dublin* house, who are the purchasers. Now, the *Liverpool* house had not received the consignment, they had only received the bill of lading, indorsed by the *Dublin* house to them in their quality of factors. It appears that the same conveyance which brought them the bill of lading indorsed, also apprized them of certain bills having been drawn upon them by the *Dublin* house; but when I look to the course of dealing between these parties, it is not possible to ascribe the drawing of these bills to this particular consignment, so as to consider it as a specific pledge on this account. The course of dealing shews that there was an account current between them, the *Dublin* house remitting, from time to time, such bills as they thought proper to the *Liverpool* house, and drawing upon them without regard to an exact correspondence between their remittances and their drafts. In their

letter

letter transmitting the bill of lading in question, they make remittances to about 1500*l.*, and draw to the amount of between 2000*l.* and 3000*l.* This amount, it is true, was somewhere about the value of the remittance and consignment, but there is nothing in the letter to mark the appropriation of the wheat to these drafts, and the course of dealing plainly shews, that it never was intended. Under these circumstances, then, the *Liverpool* house claims, not to retain possession of property which has duly come to their hands, but to take possession of property which has never reached them, to the exclusion of the owner's right to recall it while it is yet *in transitu*. The bill of lading was sent by the plaintiffs to the *Dublin* house, under an expectation that they would make good their acceptances; and they forwarded the same to the *Liverpool* house, as their factors, who are, therefore, entitled to no other rights than what ordinarily belong to factors. Suppose, then, this wheat had come into the possession of the *Liverpool* house in due course, what would have been the rights of their assignees? If the wheat remained unsold by the *Liverpool* house when they became bankrupt, the *Dublin* house might have stepped in and insisted upon its return to them in specie, subject to any lien which the factors might have; for the property in specie would have belonged to the principals. So that here it appears that the *Dublin* house, although the wheat had been actually in the possession of the *Liverpool* house, might have reclaimed it; for the *Liverpool* house could have had no lien upon it, the balance of accounts being against them. Notwithstanding this, the assignee of the *Liverpool* house now contends that the property is to be sold, not for the benefit of the *Dublin* house, but for

1816.

PATTEN *against* THOMPSON.

the purpose of its being distributed among the creditors of the *Liverpool* house, although the property never actually came to their hands, and they have in no respect performed any part of their engagement, by payment of the bills valued upon them. This seems to me to be in substance the language of the *Liverpool* house. The answer to it is plain, that it would be doing a great injustice, if in a case where there has been no pledge of the property, they were permitted to hold and apply it to their own use, and disappoint the real object for which it was sent to them. It appears to me, therefore, that the plaintiffs being entitled to stop the goods as against the *Dublin* house, the insolvent vendees, this right was not determined by the fact of the vendees having indorsed and placed the bill of lading in the hands of the *Liverpool* house as their factors.

ABBOTT J. I am also of opinion that the plaintiffs are entitled to judgment. The case states that the plaintiffs, being resident at *Westport*, in *Ireland*, sold the wheat to the *Dublin* house, and transmitted to them the bill of lading, valuing also upon them for the price of the wheat which they shipped for *Liverpool*. The *Dublin* house accepted the bills thus drawn upon them, but this would not prevent the plaintiffs from exercising their right to stop *in transitu*, if circumstances should intervene, before the delivery of the wheat to the *Dublin* house, or their assigns, to warrant such a stoppage. The question is, whether the transactions which took place between the *Dublin* house and the *Liverpool* house deprived the plaintiffs of this right. With respect to this part of the case, it appears, that the *Dublin* house having received the invoice and bill of lading, and having accepted

cepted and returned to the plaintiffs their drafts for the price, forwarded the bill of lading, together with bills of exchange, to the amount of 1500*l.* and upwards, to be placed to their credit to the *Liverpool* house, advising them, at the same time, that they had valued on them to the extent of about 3000*l.*; this amount, as it is observed, nearly balancing the value of the wheat, and the remittances. The case states a prior transaction of the consignment of wheat, by means of a bill of lading, and of the remittance and drawing of bills between the same parties. From all which, I think, it sufficiently appears, that these parties were engaged together in a course of dealing as principal and factor. Things being in this situation, the cargo in question arrives at the port of *Liverpool*, and almost immediately upon the ship's entering the dock she is visited by a clerk from the *Liverpool* house, who finally, after some demur from the mate, in the absence of the captain, and contrary to his express orders, which he was well authorised to give, obtained a sample of the wheat. Now this could not, under the circumstances, amount to a delivery of the wheat; indeeed it appears, that the *Liverpool* house must have been bankrupt at the time, for a commission issued against them the next day. But how does the case stand with respect to the plaintiffs? We find, that on the very next day after the ship came into dock, the plaintiffs' agent, being armed with the proper documents, went on board and demanded the wheat in their names, and obtained from the captain an undertaking not to deliver it to any one but their agent, upon condition that the agent should indemnify him, and pay the freight, which condition was performed the following day. It appears, therefore, that the plaintiffs

1816.

PATTEN *against* THOMPSON.

tiffs did, as far as in them lay, every thing to stop the cargo *in transitu*, and take possession. The messenger, however, under the commission against the *Liverpool* house, intervened, and prevented the actual delivery to the plaintiffs. Now, if the *Liverpool* house had at this time been solvent, so as to have been persons capable of taking possession, I speak with great deference to the opinion of my Lord, but if such had been the case, I should have felt so much doubt as to have desired farther time to consider. The case of *Lickbarrow* v. *Mason* is an authority to shew, that a pledge made by the consignee of goods to a factor is sufficient to divest the consignor of his right to stop *in transitu*. In that case, certain merchants at *Middleburgh* shipped goods on account of *Freeman* of *Rotterdam*, drew upon him for the amount, which bills were accepted, and transmitted to him the invoice and bills of lading indorsed, which *Freeman* afterwards sent to the plaintiffs, in order that they might take possession of the goods and sell them on his account. *Freeman*, at the same time, drew upon them nearly to the amount of their value. It is not expressly stated that the bills were drawn against the goods; but I observe, that *Buller* J., in delivering his judgment in the House of Lords, takes notice, that the bills were drawn by *Freeman* upon the plaintiffs on the same day and at the same time that he sent the goods, whence he concludes, that it must be taken as one entire transaction. The present case differs in this particular, because this does not appear to be a single transaction, but only one of several between the parties. But I am not quite prepared to say, that, upon the facts here stated, it might not be fairly argued, that the *Liverpool* house accepted the drafts inclosed to them in

in the letter of the 8th *June*, upon the faith of this very cargo, the bill of lading for which they received by the same letter. This, perhaps, was a question of fact for the jury. But, taking this case as one between principal and factor, who were engaged in a general course of dealing, the principal consigning to his factor from time to time cargoes to be sold for his account, and remitting bills, and drawing upon him in such manner as to form a general account between them, I should have required farther time, as I have already stated, to consider whether, if the factor might have retained this cargo had it come to his possession, he would not also have had a right to insist upon taking possession, in order that he might retain. *Kinloch* v. *Craig* differs in this respect, that there the bill of lading was unindorsed. Perhaps, however, my doubt might, upon consideration, turn out to be not well founded; and it is not material upon the present occasion, because here not only did the factors not take possession of the cargo, but they were not in a condition to do so, or to perform the trust upon which it was sent to them, they having become bankrupts; and certainly their assignees could not take possession in order to sell, because any sale made by them must have enured to place the proceeds to the account of the general body of creditors, and not to the particular account of the *Dublin* house, for whose account alone it was consigned. As, therefore, the situation of the *Liverpool* house was changed, so as to render them incapable of taking possession at the time when the cargo arrived, and as their assignees, who afterwards seized the cargo, were incapable of performing the duties entrusted to the bankrupts, I am of opinion, that they had no right to interpose and prevent

the

1816.

PATTEN *against* THOMPSON.

the unpaid vendors from stopping *in transitu;* wherefore the plaintiffs are entitled to judgment.

HOLROYD J. I am likewise of opinion, that there ought to be judgment for the plaintiffs. Considering the plaintiffs as unpaid vendors, who had consigned this cargo upon sale to the *Dublin* house, and the *Dublin* house, as having indorsed this bill of lading in a general course of dealing with the *Liverpool* house as factors, I think it is clear, that the plaintiffs had a right, upon hearing of the insolvency of the *Dublin* house, to take measures for stopping the consignment *in transitu*, and to carry those measures into execution, as against all the world, except those who had acquired an interest in the consignment, under the bill of lading. It is clear, that the *Liverpool* house had acquired no such interest, because the bill of lading was indorsed to them, merely for the purpose of enabling them to receive the cargo, in their character of factors; therefore, the indorsement of the bill of lading does not vary the antecedent rights of the parties. By the bankruptcy of the *Liverpool* house, they became incapacitated to act as factors, and their assignees could not act for them, for the reasons that have been given; nor does it appear that the balance of accounts was in favour of the *Liverpool* house, so as to have given them a lien, supposing they could have insisted upon a delivery to themselves. It appears to me, therefore, under all the circumstances, that the plaintiffs were not divested by any thing which had passed between the vendees and their factors of their right to stop this cargo *in transitu.*

Judgment for the plaintiffs.

1816.

Doe on the Demise of Mason and Others *against* Phillips.

Tuesday, November 12th.

Where an annuity was secured by bond and warrant of attorney, and by indenture charging lands, and the indenture stated the annuity to be granted in consideration of 1050*l.* paid by the grantee to the grantor, on which was indorsed a receipt for the money from the grantee *by payment of T. H., his agent*, and the indenture also contained a proviso, that execution should not be taken out upon the warrant of attorney until 40 days after the day limited for payment of the annuity; and the memorial set forth the bond with its date, and the indenture *as bearing even date therewith*, but omitted any mention of the proviso. Held, that the memorial sufficiently contained the date of the indenture, and need not set forth the proviso; that the receipt, coupled with the indenture, sufficiently described the person by wh[o the] consideration was paid.

IN ejectment upon a case reserved at the last *Hereford Lent* assizes, the question was, as to the sufficiency of the memorial of an annuity for 150*l.* granted by *W. Lemon* to *C. P. Crawford*, and secured by bond dated the 4th *July*, 1798, and by two several warrants of attorney made by the said *Lemon* and the defendant, authorizing judgments to be entered up immediately, and also by indenture, to which the defendant was party, charging the premises in question, of which the defendant was seised for life. This indenture was of the same date with the bond, and stated the annuity to be granted "in consideration of 1050*l.* to the said *W. Lemon*, by the said *C. P. Crawford*, on that day in hand, well and truly paid, the receipt whereof is hereby acknowledged;" and a receipt was indorsed on the indenture for the above sum, as received on the day of the date of the indenture, "*from the within named C. P. Crawford, by the payment of Thomas Harvey his agent.*" The indenture also contained a proviso, that no execution should be taken out upon the said judgments, or either of them, until the annuity, or some part thereof, should be in arrear for the space of 40 days after some or one of the days limited in the said bond for payment thereof.

The

1816.

Doe dem. Mason against Phillips.

The memorial duly set forth the bond with its date; in one part of which it was stated, *that Crawford paid to Lemon the said sum of* 1050*l.*, *by the payment of Thomas Harvey his agent.* The warrants of attorney were set forth as bearing even date with the bond. The indenture was also described "*as bearing even date with the bond,*" and as being made "*in consideration of the said sum of* 1050*l. to the said W. Lemon, by the said C. P. Crawford, paid as aforesaid.*" There was no mention in the memorial of the proviso above stated. No judgment had been entered up upon either of the warrants of attorney.

This case was argued at *Serjeants' Inn* before this term, by *W. E. Taunton* for the plaintiff, and by *Puller* for the defendant, when three objections were made. 1st, That the memorial did not state the date of the indenture. To which it was answered, that inasmuch as the memorial stated the date of the bond, and that the indenture bore even date therewith, it did in effect by words of reference state the date of the indenture; and this objection was not farther pressed. 2dly, It was objected that the indenture was void, by reason of its stating the consideration to have been paid by *Crawford*, when it appeared by the receipt to have been paid by *Crawford*'s agent; for the deed itself ought to state truly the payment of the consideration, the language of the act of parliament being express "in every deed," and the receipt indorsed is no part of the deed so as to help this omission in the body of it. To this it was answered, that the receipt, though not a part of the deed itself, might nevertheless serve as explanatory of it; and the judgment of the Master of the Rolls upon

this

1816.

Doe dem. Mason against Phillips.

this point was quoted, who said (a), "Proceeding upon the supposition, that the statute requires the precise fact to appear by the deed, that is substantially complied with here; for in the receipt indorsed upon the deed, the payment is stated to be made by *Harvey* as agent for *Crawford*." Lastly, it was objected, that the memorial was insufficient by reason of the omission of the proviso, restricting the taking out execution; and upon this point, *Ex parte Ansell* (b), *Cunningham* v. *Mackenzie* (c), and *Orton* v. *Knight* (d), were cited. In answer to these cases, in which it was admitted, that the Court, upon summary application, gave effect to this objection, it was said, that they were prior to the case of *Horwood* v. *Underhill* (e), which had laid down a different rule. And according to Lord *Kenyon* in *Mougs* v. *Leake* (f), there is no occasion to insert in the memorial all the covenants in a deed, unless they modify the grant itself. Now, here the proviso was a mere qualification of one particular remedy, but does not modify the terms of the grant.

Lord ELLENBOROUGH C. J. The case of *Horwood* v. *Underhill* has decided that the memorial need not state the extent of the remedy; and here the extent to which the remedy is made available is narrowed by the proviso, that execution shall not issue until after forty days default; by parity of reason, therefore, this which

(a) 9 *Ves.* 220.
(b) 1 *Bos. & Pul.* 62.
(c) 2 *Bos. & Pul.* 598.
(d) 3 *Bos. & Pul.* 153.
(e) 1 *Taunt.* 546., reversing judgment of *B. R.*, 10 *East*, 1 .
(f) 6 *T. R.* 411.

1816.

Doe dem. Mason against Phillips.

is but a qualification of the extent of the remedy need not be stated.

Bayley J. Upon the second objection, inasmuch as it appears by the receipt, which bears date on the same day as the deed, that the money was paid by the hands of an agent of *Crawford*, I think that the annuity act is sufficiently satisfied. As to the last point, it seems to me, that *Horwood* v. *Underhill* has afforded a safe rule, to find what is required, by directing us to the act itself. In *Horwood* v. *Underhill*, it is laid down in distinct terms, that it is not necessary to specify the extent to which the different deeds operate; whence it seems to me to follow, that it is not necessary to state this proviso, which qualifies the remedy. But if the objection upon this point had been well founded, I should have thought that it would only have gone to vacate the warrant of attorney.

Abbott J. I am of the same opinion. Two objections are now relied on; first, that the agent by whom the consideration was paid, is not named in the deed. As to which, I am of opinion, that the agent is, within the fair meaning of the act of parliament, named in the deed. The money was *Crawford*'s money, and the payment was virtually made by him; but, on the back of the deed, the receipt, which is part of the grantee's security, evidencing that the money was paid, shews that it was paid by *Harvey*, as agent for *Crawford*. This, I think, is sufficient. (*a*) The next objection is, that the

(*a*) See *Burgh* v. *Preston*, 8 *T. R.* 483, as to the effect of a memorandum indorsed on a deed. Also, 1 *Roll. Abr.* 413. tit. *Condition*.

proviso

1816.

Doe dem. Mason against Phillips.

proviso that no execution shall be taken out until after forty days default in payment, is not set forth. Whether this be necessary or not depends on the Act 17 *G.* 3. *c.* 26. And I confess, that it is a great satisfaction to me, that I have not to sit in judgment on such a question, until after the decision in *Horwood* v. *Underhill*, which has released us from the difficulties imposed by former decisions. I consider that case as imperiously calling us back to the Act itself. It is said, that this delay of execution forms properly one of the considerations upon which the annuity was granted, and that the Act requires the consideration or considerations to be set out. I cannot help thinking, that these words of the statute were used in the sense of pecuniary consideration only, and not in the more technical and refined sense which has been given to those words in former decisions; more especially when I consider the very penal consequences of the statute. It appears to me, therefore, that we are not required, in construing this act, to hold that the special clause, delaying the execution, forms any part of the consideration which ought to be set out in the memorial.

HOLROYD J. I am of the same opinion. The cases of *Orton* v. *Knight*, and *Cunningham* v. *Mackenzie*, were decided at a time when the statute was looked upon as a remedial law, without adverting to the penal consequences attending the very enlarged construction given to it. But it must be remembered, that the Act contemplates a forfeiture of the securities, and, therefore, ought certainly to be regarded as a penal, as well as a remedial law. In *Horwood* v. *Underhill*, it is treated as a

penal

1816.

Doe dem. Mason against Phillips.

penal enactment; and, therefore, a different construction was come to in that case from that which formerly prevailed. It seems to me that this is the true construction, and consequently the proviso forms no part of the consideration which the memorial is required to state. The decision in *Horwood* v. *Underhill* appears to me to go much farther than the present; for there the grantor bound his heirs as well as himself, by which the obligation was binding upon a class of persons not otherwise liable; yet the omission of the word *heirs* in the memorial was holden not to vacate the bond, because the Act does not require that the memorial should state the extent to which the instrument is binding. So, in this case, I think the proviso was only a qualification of the extent to which the grantor was bound; and, therefore, is not required to be memorialized.

Judgment for the Plaintiff.

Tuesday, November 12th.

NASH and Another *against* PALMER.

The condition of a bond, which recited the purchase from *W* by plaintiffs of lands, was to save them and the lands harmless from all manner of mortgages, judgments, extents, executions, and other incumbrances, had and obtained, or thereafter to be had and obtained, by *T. T.*, or any other person; and it was held to bind the obligor against the wrongful entry of *T. T.*, being particular against the acts of a particular person.

DEBT on bond, dated 9th *September*, 1813. The defendant craves oyer of the bond, which is in the penalty of 880*l.*; he likewise craves oyer of the condition, which recited, that the plaintiffs lately purchased of one *Woodroffe*, a cottage and premises in *Bedford*, for 440*l.*, and that the premises were to be conveyed by lease and release of the 2d and 3d *November*,

1816.

NASH *against* PALMER.

ber, 1812, to the plaintiffs, by *Woodroffe* and wife, yet owing to certain circumstances, the purchase had not been completed, and that the plaintiffs had agreed to complete it, on the defendant's giving his bond in the above penalty, subject to the conditions after mentioned; and that *Woodroffe* and wife had, accordingly, on the day of the date of the bond, executed the conveyance, and the plaintiffs had paid to him the 440*l*., the purchase money; and the condition was, that the defendant, his heirs, executors, or administrators, should, from time to time and at all times thereafter, well and effectually save harmless the plaintiffs, their heirs and assigns, and the said cottage and premises, of and from all manner of mortgages, judgments, extents, executions, and other incumbrances whatsoever, at any time theretofore given by *Woodroffe* to *T. Times*, or any other person, or had and obtained or thereafter to be had and obtained by *T. Times*, or any other person, under and by virtue of any act, matter, cause, or thing theretofore done, or committed by *Woodroffe*, and also of, from, and against all manner of actions, causes of action, suit, losses, costs, charges, &c. whatsoever, which should or might be brought against, or borne by the plaintiffs, or either of them, or either of their heirs, &c., for or on account of the said mortgages, judgments, extents, executions, and other incumbrances, or of any suit or suits then pending by the plaintiffs against *Woodroffe*, *T. Times*, the defendant, *W. Smith*, and *J. Bedford*. And the defendant pleads, that, at the time of making the bond, and from thenceforth until the expulsion hereinafter mentioned, the plaintiffs were, by virtue of the purchase in the condition mentioned, in possession, by their undertenant, of the premises, and

 being

1816.

NASH *against* PALMER.

being so in possession, a declaration in ejectment, with notice to appear thereto, was served on the under-tenant, for the purpose of obtaining, on the part of *T. Times*, possession of the premises, which proceedings were had by *Times* under colour of an *elegit*, sued by *Times* against *Woodroffe*, in execution of a judgment upon a warrant of attorney, given by *Woodroffe* to *Times*, although *Times* had not any right to bring the said ejectment; and such proceedings being pending at the time of making the bond, the plaintiffs and their under-tenant afterwards suffered judgment by default, although they might have successfully defended the ejectment, whereupon *Times* obtained possession, and expelled the plaintiffs and their under-tenant from the possession; and so the defendant pleads, that if the plaintiffs were, by reason of the premises, damnified, it was of their own wrong, and that except in the premises, the plaintiffs have not, nor hath either of them, or any of their assigns, or the said premises in the condition mentioned, or any part, at any time since making the bond, been in any wise damnified, by reason of any matter or thing in the condition mentioned.

Secondly, the Defendant pleads, as before, that, at the time of making the bond, &c., the plaintiffs were, by virtue of the purchase, in possession, &c., and that a declaration in ejectment, &c. was served, &c.; and such proceedings being so pending at the time of making the bond, the plaintiffs, just before that time, had informed, and assured the defendant, by one *F. B.*, their agent in that behalf, that an appearance had been duly entered, and a plea pleaded to the said ejectment; and the defendant, confiding in that assurance, was thereby induced to execute the bond; and the defendant avers,

that

1816.

NASH *against* PALMER.

that no such appearance was ever entered, or plea pleaded as aforesaid, and that by reason thereof, afterwards, judgment in the said ejectment was obtained on the part of the plaintiff therein for default of appearance, and plea to the same, although the plaintiffs might, by reason of the premises, have successfully defended the said ejectment, whereupon *T. Times* afterwards obtained possession of the premises and expelled the plaintiffs; and the defendant avers, that, by reason of such assurance, he had no knowledge of the default of appearance or plea, until judgment had been obtained; and that, except in the manner above mentioned, the plaintiffs have not, nor hath either of them or their assigns, or the premises, or any part thereof, since the making the bond and condition, been in any wise damnified by reason of any thing in the condition, &c. Demurrer to both pleas. Joinder.

This case was argued at *Serjeants' Inn* before this term.

Hullock Serjt., in support of the demurrer, argued, that these pleas were ill; and he took a distinction between a covenant against the acts of a particular individual, as in the case at bar, and where the covenant is against the acts of all persons. For when the covenant is to save harmless against a person certain, the covenantor ought to defend him against the entry of that person, be it by *droit* or *tort*; for he is damnified if he be disturbed, though by wrong: but if the covenant be to save him harmless against all persons, there it shall be taken for a lawful entry or eviction; and the words "to save harmless" amount to no more than a war-

 ranty,

1816.

NASH against PALMER.

ranty, for that is for lawful title. (a) So here, the covenant being against the act of *Times*, interruption by him is sufficient, without saying by what title (b); and it is no answer for the defendant to plead *Times*'s want of title. Neither had the plaintiffs need to give the defendant notice of the damnification occasioned by *Times* (c); but if this were necessary, it appears, from the condition of the bond, that the defendant must have had notice.

Stephen, contrà, argued, that this was a condition only against the rightful, and not against the wrongful, entry of *Times*; and, he said, the intention of the parties to this obligation was to secure to the purchasers their money, or their money's worth; and, therefore, it was enough to satisfy this intention, if the plaintiffs were saved harmless against rightful title; for the law secures them against tortious entry. And the naming of *Times* in the condition will not make it particular as to him, if the words of the condition be not express, and there be no more reason for making them so as to him than as to any other person who is not named; and, therefore, *Times* must still be considered as a stranger. But it is laid down, "that the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose; for the law itself does defend every man against wrong; and, therefore, though one warrant lands to another expressly, yet he does not defend against tortious entries. (d)"

(a) *Foster* v. *Mapes*, *Cro. Eliz.* 213. 1 *Leon.* 324. *S. C.* recognized in *Tindale* v. *Sir W. Fynes*, *Hob.* 35. *Perry* v. *Edwards*, 1 *Str.* 400.

(b) 2 *Lev.* 37. See also *Com. Dig. Plead* (C. 49.)

(c) *Cutler* v *Southern*. 1 *Saund.* 116.

(d) 2 *Saund.* 178. a. n (8), Serjt. *Williams*' ed.

Where-

1816.

NASH *against* PALMER.

Wherefore, in debt upon an obligation, the condition of which was to warrant and defend certain land to the obligee against *T. S.* and all others, it was adjudged that this extended only to lawful title, and not to trespassers. (*a*) And as to *Perry* v. *Edwards*, cited *contrà*, the covenant was to save him harmless from costs or damages relating to a particular seizure; so that there was an express warranty against any expence the plaintiff might be put to by reason of the seizure, without regard to title. Admitting, however, this condition to bind the defendant against disturbances of whatever nature by *Times*, it surely cannot be extended to such as the plaintiffs have themselves occasioned, as shewn by the second plea; for where the obligee is the cause that the obligation cannot be performed, there shall be no forfeiture; for it is his own act. (*d*)

Lord ELLENBOROUGH C. J. I think it is unnecessary to trouble the counsel for the plaintiffs to reply. It seems to me that, on both points, the plaintiffs are entitled to judgment. The question on the first plea is, as to the extent of the defendant's undertaking to indemnity; as to which the rule has, I think, been correctly stated at the bar, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the

(*a*) *Crocooke* v. *White*, *Moor*, 175.
(*b*) *Bro. Abr. Condition*, *pl.* 127.

1816.

NASH *against* PALMER.

folly or malice of strangers might suggest; and, therefore, the law has properly restrained it within its reasonable import; that is, to rightful title. It is, however, different where an individual is named; for, there, the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise. Now here, *quoad Times*, the plaintiffs might have reason to apprehend that he would disturb their possessions; a suit was pending; they, therefore, say to the defendant, "we will have an indemnity against *Times*, who, having already disturbed us, may possibly be farther troublesome: we will not buy a law-suit." The defendant's answer is, "I will indemnify you against this suit and all farther proceedings." Why, then, should this indemnity be abridged? Or why should not the plaintiffs have a right to say to the obligor, "This suit is not our concern; it is yours. You have indemnified us against the acts of *Times*. This is his act, and you must look to it; but we may be passive?" Then, as to the second plea, it is alleged, that at the time of the execution of the bond, a communication was made by the plaintiffs' agent to the defendant, that an appearance had been entered, and a plea pleaded to the ejectment. I take it for granted that the agent communicated what he believed; but it seems to me, that unless this plea could have gone farther, and shewn that the communication was fraudulently made, it is not sufficient to defeat this indemnity. There is a great difference between a fraudulent representation and an erroneous one. In *Haycraft* v. *Creasy* (a), which was founded on *Paisley* v. *Freeman*,

(a) 2 *East*, 92.

man (a), the Court were of opinion that the misrepresentation must be fraudulent, in order to charge the party who makes it. This, on the contrary, seems to have been a casual, improvident communication, respecting a matter which the defendant should not have taken upon trust, but was bound to inquire into himself, and had the means of ascertaining; and, therefore, he shall not be permitted to set aside this obligation merely because a fact was mis-stated, it being so without any fraud. The bond shall not be avoided by an innocent misrepresentation upon a subject to which the obligor was bound himself to look. Upon this point, therefore, as well as upon the construction of the covenant, considering it as special, I think there must be judgment for the plaintiffs. The condition is, "We, the plaintiffs, will have no litigation with *Times*; you, the defendant, shall stand to the consequences." Now, the plaintiffs have been disturbed by the very man against whose acts the defendant covenanted. The indemnity is special, and not general; and the consequence follows as laid down in argument by the plaintiffs' counsel.

BAYLEY J. I think both pleas are bad. The condition is, to save the plaintiffs harmless against any suit by *Times*. It appears from the pleadings, that *Woodroffe* had executed a warrant of attorney to *Times*, upon which judgment had been entered, an elegit sued out, and an ejectment brought by him at the time of making this obligation; and that the plaintiffs' under-tenant was afterwards deprived of possession by force of this ejectment. The authorities cited by my Brother *Hullock*

(a) 3 T. R. 51.

establish

1816.

Nash *against* Palmer.

establish this principle, that if there be a covenant or obligation to indemnify against the acts of a person specified, it is good against the obligor, whether the eviction be by lawful title or not. The answer given in the first plea is, that *Times* had not a lawful title, and that the ejectment might have been successfully defended. If so, it was the defendant's duty to have resisted and defeated it. He can have no cause to complain of the result, unless he had offered to defend, and had been prevented by the plaintiffs. But the plea stops short where it ought to have proceeded; for it ought to have averred, that the defendant offered to defend, and was prevented; or, to have shewn how the plaintiffs might have successfully defended. There was a *primâ facie* title in *Times*. The defendant ought to have alleged facts which would amount to a defence, and to have shewn that they existed within the knowledge of the plaintiffs. On these grounds, I think the first plea is bad. With respect to the second, the only difference is, that it is there alleged, that the the plaintiffs, by their agent, informed the defendant that an appearance had been entered, and a plea pleaded; which information was untrue. But the plea does not allege that the defendant executed the bond upon a condition that this was a true representation; nor that the representation, though untrue, was fraudulent. It is also open to the same objection as the former; namely, that it does not shew the grounds upon which the ejectment could have been successfully resisted.

Per Curiam, Judgment for the plaintiffs.

1816.

BICKERTON *against* BURRELL.

Tuesday, November 19th.

A plaintiff who has made a contract as agent for a third person, cannot sue as principal without giving notice to the defendant before action brought, that he is the party really interested.

ASSUMPSIT to recover from the defendant, an auctioneer, a deposit made by the plaintiff, upon a purchase of a ground rent by public auction. Plea non-assumpsit. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, the case was thus: The plaintiff, at the time of the sale and payment of the deposit, signed the following memorandum, dated 2d *May*, 1815;

"I have this day purchased of Mr. *C. Burrell*, by public auction, the improved ground rent described lot 1st in the annexed printed particular of sale, for the sum of 600*l.*, and have paid to the said *C. Burrell*, a deposit of 120*l.* in part of the said purchase.

"And I do also agree to comply with all the conditions which were read or referred to at the time of sale, whether printed or written.

(Signed) "*J. Bickerton*,

"For *C. Richardson*,

"No. 16, *Swan-Place, Kent Road*."

The plaintiff also took a receipt for the deposit money in this form.

"Received 2d *May*, 1815, of Mr. *J. Bickerton*, for Mr. *C. Richardson*, 120*l.* being the deposit on the purchase of leasehold ground rents at *Hackney*, purchased by him this day, and in part payment,

"For *Chs. Burrell*,

"*J. Whibell*."

Upon this evidence it was objected, that the action should have been by *C. Richardson*, the plaintiff as appeared

1816.

BICKERTON *against* BURRELL.

appeared by the contract, being only the agent of *C. Richardson*. His Lordship inclining to this opinion, the plaintiff proposed to call *C. Richardson*, (who was a female, and was stated to be the house-keeper of the plaintiff,) to prove that she had never authorised the plaintiff to use her name, or to make the purchase for her, nor had advanced any money, or was capable of advancing any to make such a purchase, and that she claimed no interest in it, nor knew of it until a short time before the action. And it was suggested as a reason why her name had been used, that the plaintiff intended the purchase for her benefit. His Lordship ruled, that it was not competent to the plaintiff, by the proposed evidence of *C. Richardson* to maintain the action, and so the plaintiff was non-suited.

A rule nisi having been obtained for setting aside the non-suit,

Scarlett and *Puller* shewed cause at the sittings at *Serjeants Inn* before this term, and argued against the plaintiff's right to maintain this action, that where an agent contracts in the name of another as his principal, the agent is not entitled to sue in respect of that contract. And they urged the inconvenience and uncertainty that would follow from a contrary doctrine. For if, in the case at bar, it were competent to the plaintiff to sue, without disclosing until the trial that he is the principal, the consequence would be, that the defendant must of necessity defend the action, or must leave himself liable to two actions for the same cause; for if he suffered judgment by default in this action, he would have no defence to another action at the suit of *C. Richardson*. It may be admitted, that where money

1816.

BICKERTON *against* BURRELL.

is paid by an agent upon an agreement made with him in his own name, the principal may recover it back upon the rescinding of the agreement (*a*); but this is founded upon a rule which does not affect the present case, namely, that a principal may intervene and claim the benefit of his agent's contract.

Marryatt and *Parke* (with them the Attorney-General) *contrà*, argued, that wherever money has been paid upon a consideration which has failed, the owner is entitled to an action for the recovery of it, if he can shew that the money was his. Upon this principle the case of *The Duke of Norfolk* v. *Worthy* was determined, and in *Bethune* v. *Farebrother*, where the plaintiff, not wishing to appear as purchaser, procured *J. S.* to bargain for him, who signed the contract (not as agent) and paid the deposit by his own check; yet, inasmuch as it was the plaintiff's money, he was allowed to maintain an action for it, without shewing any disclaimer by *J. S.* And upon a like doctrine, is also founded the right of every principal to interpose and supersede the right of his agent, by claiming to have the contract performed to himself, although made in the name of his agent: the shewing that he is principal, being of course, matter of evidence. So here the plaintiff would have shewn, if he had been allowed, that the contract was his, and that the money paid under it was his, although, upon the face of the contract, it appeared as if he were but an agent. But what is there to estop the plaintiff from averring that he was principal? If he be estopped, as estoppel is mutual, the defendant must also be estopped

(*a*) *Duke of Norfolk* v. *Worthy*, 1 *Campb. N. P. C.* 337.

from

1816.

Richardson v. Williamson

from shewing that any one else than Mrs. *Richardson* was contractor, and yet the contract would be no evidence for the defendant against Mrs. *Richardson*, unless he could prove that she authorised the making of it. It is true that the plaintiff, by signing himself as agent to Mrs. *Richardson*, has let in the defendant to all the equities that he would have had in case the action had been brought by Mrs. *Richardson* (a); but farther than this the law will not go, to deprive him of the rights belonging to him as principal.

Lord Ellenborough C. J. This is an action, founded upon a contract made by the plaintiff in the character of agent to an individual named by him as principal, and the question is upon the plaintiff's title to sue. In the ordinary transactions of commerce, a man may sell or purchase in his own name, and yet it does not follow that the contract is his, but the transaction is open to explanation, and others who do not appear as parties to the contract are frequently disclosed, and step in to demand the benefit of it. But where a man assigns to himself the character of agent to another whom he names, I am not aware that the law will permit him to shift his situation, and to declare himself the principal, and the other to be a mere creature of straw. That, I believe, has never yet been attempted. Now, on the face of this agreement, it is stated that the plaintiff made the purchase, paid the deposit, and agreed to comply with the conditions of sale for *Richardson*, and in the mere character of agent. Is not this account of himself to be taken *fortissimè contra proferentem*; that

(a) *George* v. *Claggett*, 7 *T. R.* 359. *Stracey* v *Deey*, *ibid.* 361. n

is, that he was really treating in the character which he assigned to himself at the time of the purchase? And has not the defendant, with whom the plaintiff dealt as agent, a right still to consider him as such, notwithstanding he would now sue in the character of principal? Supposing that he might, under a different state of circumstances, have entitled himself to sue in his own name, surely the defendant ought to have had notice of the plaintiff's real situation before he is subjected to an action at the plaintiff's suit, and while it was open to him to make a tender. It was proposed to call Mrs. *Richardson* to prove that she had no interest in the transaction; and a reason was assigned why her name appeared in it, viz. that the purchase was intended for her benefit. Admitting this to be so, yet the question still occurs, whether a man who has dealt with another in the character of agent is at liberty to retract that character without notice, and to turn round and sue in the character of principal. As to which, it appears to me that the defendant ought at least to have an opportunity of knowing by means of a specific notice, before he is dragged into a court of justice, the real situation in which the plaintiff claims to stand, in order that he may judge how to act. In the present case, *non constat* but that the defendant would have tendered the money. It was the plaintiff's fault originally that he misled the defendant, by assuming a situation which did not belong to him, and therefore he was bound to undeceive the defendant before bringing an action. This seems to follow from a consideration of what the common principles of justice demand, which accord with the cases decided upon this subject. I recognize the authority of

The

1816.

BICKERTON *against* BURRELL.

The Duke of Norfolk v. *Worthy*, which was merely the case of an undisclosed principal at the time of sale. Dr. *Bethune's* case is of like import; and it has been settled in many cases, that a principal, when disclosed, may step in and exercise his own rights. But it is wholly without precedent I believe, and as it seems to me contrary to justice, that a person who has exhibited himself as agent for another, should at once throw off that character, and put himself forward as principal, without any communication or notice to the other party.

BAYLEY J. If the plaintiff had been prepared with evidence at the trial to prove, not only that it was his money, but also that the defendant knew that *C. Richardson* was a mere nominal party, and had notice that she was not in anywise interested in the bargain,—I should have thought the case ought to have gone to a new trial; because such a notice would have enabled the defendant to procure from *C. Richardson* a renunciation of any claim on her part. But this action is brought, not only before any renunciation has been made by *C. Richardson*, but also before the defendant was allowed an opportunity of procuring any renunciation. In the original contract the plaintiff describes himself as agent for *C. Richardson*, for the purport of the memorandum is, that the plaintiff, as agent for *C. Richardson*, has purchased the lot, and has paid the deposit, and agreed to comply with the conditions of sale for *C. Richardson*. The receipt given by the defendant is of similar import. Therefore, throughout the whole transaction, the plaintiff represents himself as contracting in the character of agent, and paying the money, not as his own, but that of his principal. This being so, he now seeks, without

any

any notice to the defendant of the misrepresentation which he had made, to sue in his own name. What could the defendant do under these circumstances? Perhaps he was unable to find out *C. Richardson*, in order to ascertain from her how the fact stood; yet if her renunciation was necessary to his protection, he surely was entitled to be placed in a situation to call for it, before the plaintiff brought this action. Suppose the defendant had been willing to return the deposit to the plaintiff, and had offered to do so on his procuring a renunciation of *C. Richardson's* claim, could the plaintiff have insisted upon repayment without procuring such renunciation? I apprehend he could not; yet the argument of to day can only prevail upon an assumption that he could. If the defendant were to repay the deposit to the plaintiff, without obtaining *Richardson's* disclaimer, there would be nothing to prevent *Richardson* from suing for the same cause; for the receipt imports it to be her money. If so, the necessary consequence of permitting the present action must be to compel the defendant to go on to trial, in order to furnish himself with evidence sufficient to protect him against an action by *Richardson*. Now this, as it seems to me, would be dealing out harsh measure to this defendant. The fault lies with the plaintiff, that, by the form of contract and receipt which he has chosen, he has put himself forward as a secondary person only. There would have been no difficulty, if he had purchased according to the fact, that is, in his own name; and if, through any difficulty which he has thrown on himself, by representing the fact otherwise than it really was, and which he might have removed, by giving notice to the defendant of the real state of the transaction, and

1816.

BICKERTON *against* BURRELL.

procuring for him Mrs. *Richardson*'s renunciation, or indemnifying him against her claim, all which he has omitted to do, an inconvenience is to fall on either party, it seems to me, that it ought to fall on the plaintiff. My mind has fluctuated in the course of the argument, but the right conclusion appears to me to be this, that the plaintiff cannot sustain this action, not having given any previous notice to the defendant that the plaintiff was the real party to the contract, nor afforded him the means of protecting himself against the claim of *C. Richardson*.

ABBOTT J. I am of opinion that the nonsuit was right, upon the evidence tendered to my Lord at nisi prius. This action is brought by the plaintiff, as principal, on a contract made by him, as for and in the name of *C. Richardson*. Without asserting that under no imaginable state of circumstances could the plaintiff have been entitled to maintain this action, it is enough to say, that the circumstances offered in proof in this case were not sufficient to entitle him. The plaintiff proposed to sustain this action, by proving, that, although he had professed, by his signature to the memorandum of sale, to be acting as agent, and had accepted a receipt from the auctioneer, expressing the deposit to have been paid by him as agent for *C. Richardson*, yet the contract and money paid under it were really his, and Mrs. *Richardson* was to have been the witness to make good this proof. Now it appears to me, that the plaintiff was bound to go much farther. This is not like the case where a contract is made in one name, and the action brought in another. It is perfectly clear, from what takes place ordinarily in commercial deal-

ings,

1816.

BICKERTON *against* BURRELL.

ings, that an unnamed principal may declare himself, and claim to sue upon a contract made with his agent. In general, however, where a purchase is made by an agent at auction, whether it be of lands or goods, it is tacitly understood that he does not bid on his own account; and it almost always happens, that the principal is made known before there is a necessity for resorting to an action. This was the case in *Bethune* v. *Fairbrother*, for it appeared that the defendant knew that the plaintiff was the principal. Indeed, I am not aware of any case where an unnamed principal has maintained an action, in which it appeared, that, at the time of the trial, he was, for the first time, disclosed to the defendant as principal. I therefore think, that, upon the evidence offered, the nonsuit was right. It is unfortunate for the plaintiff to have placed himself in this situation, but it his own fault.

HOLROYD J. I also am of the same opinion. On the face of this memorandum, it is in law the contract of Mrs. *Richardson*, and not of the plaintiff, and, from every thing which passed between the parties, the defendant has a right to suppose that the plaintiff was not the person entitled to sue, but that the right of action was vested in Mrs. *Richardson*. If the plaintiff can explain the circumstances under which the contract was made, so as to found for himself a right of action thereon, it is plain, that the means of such explanation must lie peculiarly within his own knowledge. On the face of the transaction, the action is maintainable by Mrs. *Richardson* only. Now it is a settled rule of pleading, that where the act on which the plaintiff's demand arises is secret, and lies within his knowledge, an action

 cannot

1816.

Bickerton *against* Burrell

cannot be maintained without notice given. In such a case the plaintiff is bound to allege notice (*a*), and if he ought to allege it, it follows that he ought to prove it. I therefore think, that it was not sufficient for the plaintiff to tender evidence at the trial of the circumstances; if he had given notice, possibly the defendant might not have resisted the action; in the absence of notice, it may be presumed that he defended, on the ground that the plaintiff had not any right of action.

Rule discharged.

(*a*) See *Com. Dig. Pleader*, C. 73.

Tuesday, November 12th.

The King *against* the Inhabitants of Burbon.

New trial refused after a verdict of not guilty upon an indictment for not repairing a road, where the verdict does not bind the right.

INDICTMENT for non repair of a highway. Plea, not guilty. Upon the trial before *Wood* B. at the last *Westmoreland* assizes, there was a verdict of not guilty

And now, *Scarlett* moved for a new trial, upon the ground that the verdict was against all the evidence; and he said, that the prosecution was for the purpose of trying a civil right only.

But, per Lord Ellenborough C. J. In general, the rule is not to grant a new trial in a criminal proceeding after a verdict of not guilty. And inasmuch as the right will not be bound on the plea of not guilty, we do not think it would be proper to break into the general rule on the suggestion that the prosecution was merely intended to determine a civil right.

Rule refused.

DOE on the demise of GILES *against* WARWICK.

Tuesday, November 12th

In ejectment, proof of service of the declaration on the tenant in possession is sufficient, without producing the landlord's rule to prove that the defendant comes in as landlord.

AT the trial of this ejectment before *Wood* B. at the last *Cumberland* assizes, service of the declaration was proved on three tenants in possession, but neither the landlord's or tenant's rule was produced, nor was there any evidence to shew the defendant to be landlord. It was objected that the landlord's rule ought to have been produced, in order to connect the defendant with the premises; to which it was answered, that service of the declaration on the tenants in possession being proved, it followed that the defendant must come in as landlord. The learned Judge being of that opinion, overruled the objection.

Parke now moved for a new trial, and cited *Goodright* v. *Rich.* (a)

LORD ELLENBOROUGH C. J. It must be presumed that the defendant is here to defend for something. He might have shewn that these were not the premises in respect of which he appeared upon the record as defendant.

BAYLEY J. In *Doe* v. *Young*, *Hilary*, 1815, service of the declaration on the tenant in possession was proved, and was held sufficient to raise the presumption that the defendant appeared as landlord, without

(a) 7 *T. R.* 327.

1816.

Doe dem. Giles against Warwick.

producing the landlord's rule. In *Goodright* v. *Rich*, the defendants, who had entered into the common consent rule, as tenants, proved that they were not, nor ever had been, in possession of any part of the premises in question.

Abbott J. I do not see why it is to be presumed that the tenant has some other lands.

Rule refused.

Wednesday, November 15th.

The King *against* the Hull Dock Company.

The *Hull* Dock Company were held rateable in respect of the tonnage duties received by virtue of statute 14 *G.* 3. c. 56. although it appeared that the expenditure in repairs during the period for which the rate was made exceeded the amount of the duties received.

ON the 2d of *November*, 1815, a rate was made for the relief of the poor of the parish of *Sculcoates* for six calendar months, commencing on the 20th of *September* then last, in which the Dock Company at *Kingston-upon-Hull* were thus rated:

Dock Company: Dock and wharf 2240*l.*: 186*l.* 13*s.* 4*d.*

Upon appeal to the *Epiphany* quarter sessions, 1816, for the East Riding of *Yorkshire*, the rate was confirmed, subject to the opinion of the Court upon the following case:

By stat. 14 *Geo.* 3. c. 56. intituled "An act for making and establishing public quays, or wharfs, at *Kingston-upon-Hull*, for the better securing his Majesty's revenues of customs, and for the benefit of commerce in the port of *Kingston-upon-Hull*, for making a basin or dock, with reservoirs, sluices, roads, and other works, for the accommodation of vessels using the said port," &c.; (which is declared to be a public act, and

to

1816.

The KING *against* The HULL Dock Company.

to be judicially noticed as such,) (*s.* 15.;) the Dock Company were empowered and required to make a basin or dock, and also a quay or wharf, and other works therein mentioned, for the general benefit of shipping, and of the trade and commerce of the said port. By the 22d section, it was enacted, "that the Company should, at all times, well and sufficiently repair, maintain, support, and cleanse the basin or dock, and the quay or wharf, and other the works." By the 42d and 45th sections, certain rates or duties on ships lading or unlading goods within the port, and certain wharfage rates on goods which should be landed on the quay, were granted to the company. Besides the emoluments arising from the dock-dues, the Company derive considerable emoluments from the rent of warehouses which they have erected, agreeably to the directions of the act. The warehouses are situate in the town of *Hull*, and not within the parish of *Sculcoates*. Two third-parts of the dock are situate within the parishes of the *Holy Trinity* and *St. Mary*, in *Hull*, and the remaining third is in the parish of *Sculcoates* In 1814 the Dock Company resolved to take down and re-build the lock and entrance basin and side walls of the dock. They acted under the advice of their engineer, who, judging the dock to be in a bad state, directed a general repair. On the 2d *May*, 1814, the ships were removed out of the dock, and the execution of the works commenced, and continued until the 31st *December* last. The expenditure of the Company in respect of these works, from the 20th *September* (being the day when the rate was made to commence), to the 31st *December* following, amounted to 5183*l.* 15*s.* 2*d.*, and the receipts of the Company in respect of the duties and wharfage rates

1816.

The King against The Hull Dock Company.

during the same period amounted only to 2963*l.* 18*s.* 7*d.* The further estimated expenditure of the Company in respect of the works, from the 31st *December* to the 20th *March* (when the six months for which the rate was made would expire), would be 1198*l.* 7*s.* 4*d.*, and the receipts of the Company in respect of the duties and wharfage-rates would be 97*l.* only. The chief part of the expense was incurred in respect of the lock and and entrance basin, which are situate in the town of *Hull*, but are essentially necessary to that part of the dock which is situate in *Sculcoates*. From the time of passing the act to the making of the rate in question, the parishioners of *Sculcoates* have, in assessing the Dock Company to the poor rate, annually made a deduction of the Company's expenditure in respect of the ordinary repairs of the dock, from the gross annual amount of the Company's duties and wharfage-rates. The sums stated in the account of expenses, were all necessarily expended in making the repairs in question, and provided the Dock Company is entitled to deduct the same from their gross receipts, there are not any net proceeds whatever for the use of the Company. The Company did not, in consequence of the re-building of the lock and entrance basin, become entitled to any greater or other duties or wharfage-rates than they were before entitled to.

The question for the opinion of the Court was, whether the Company were liable to be rated for the six months for which the rate was made.

Coltman and *Cross*, in support of the order of sessions, argued, that, inasmuch as the company were in the occupation of property rateable within the stat. 43 *Eliz.*, the circum-

1816.

The KING *against* The HULL Dock Company

circumstance of their having expended in repairs during the time for which the rate was made, a sum exceeding the receipts, furnished no ground of exemption. That this property was in its nature liable to be rated, had already been adjudged (*a*); and it plainly appeared from the facts now stated, that the proprietors were not, as in the case of *Salter's Load Sluice* (*b*), mere trustees to superintend the execution of the act, without any personal advantage. And if profits accrue to the proprietors, the subsequent application of them cannot vary the liability. Therefore, in *Rex* v. *Agar* (*c*), the trustees of a methodist chapel, who let out the pews for an annual rent, were held rateable for the chapel, though they expended more than the annual rent in maintaining the establishment; and a distinction was there taken, which is mainly applicable to this case; for it was said (*d*), that "no doubt the fair average expences ought to be allowed in estimating the quantum of the rate, but not any extraordinary expenditure which might happen to make the property unprofitable in a particular year; for where it is the subject of annual value, the money so laid out in one year will produce profit in the subsequent years." So the lessee of a coal mine was held rateable, although he actually incurred a loss by the adventure. (*e*) The persons who compose this Company are doubtless trustees for the public in seeing to the proper reparation of the docks, but they have also a dominion given them by the act over the funds, and by section 53,

(*a*) *Rex* v. *Dock Company of Hull*, 1 *T. R.* 219.
(*b*) 4 *T. R.* 730.
(*c*) 14 *East*, 256.
(*d*) *Ibid.* p 262.
(*e*) *Rex* v. *Parrot*, 5 *T. R.* 597.

are

1816.

The KING *against* The HULL Dock Company.

are to hold a general annual meeting to audit the accounts of money received and disbursed in the preceding year, and to declare whether any, and what dividend shall be made among the proprietors. The rate, therefore, is to be regulated by calculating the average profits accruing annually, according to the rule adopted in *Rex* v. *Mirfield* (a), and not by the particular state of the disbursements at any one isolated period. If it were otherwise, great inconvenience would follow; for, suppose that for a short period the whole farming interest of the country were to be a failing concern, there could be no rate at all if it were to be governed by the then present state of things, and thus the fund for the maintenance of the poor would be withdrawn at a time when it was most required. Another inconvenience would be, that it would open an inquiry into every year's account, which would occasion endless litigation.

Thompson, contrà, admitted that the Dock Company were generally rateable for profits; but, he argued, that where there was no return of profits, or in other words, no beneficial occupation, there could be no rate, according to the doctrine of the *Salter's Load Sluice* case. He said, it was admitted that the Company were trustees for the public, and they were as such bound by the act to lay out their receipts in necessary repairs for the public accommodation. And the present expenditure was of such a nature as not to be capable of being included in the deductions on account of ordinary repairs; for it was in great part incurred for new works; from the addition of which, an improve-

(a) 10 *East*, 219.

ment

1816.

The KING *against* The HULL Dock Company

ment in the duties was not likely to accrue. If then the Company were bound by law to apply the whole of the advantages which would otherwise have accrued to them, to public purposes, without the probability of any improvement thereby, how does this case differ from the *Salter's Load Sluice* case? The Company cannot retain these proceeds to answer future objects of expense, but wherever there is a surplus, they must make a dividend.

Lord ELLENBOROUGH C. J. The act of parliament does not require the Company to make a dividend at all events, nor does it say, that they shall divide to the extreme limit of the monies received. Suppose an application to be made to this Court for a mandamus, to compel the Company to make a dividend of the whole balance in their hands, if the Company were able to shew that the expense of the necessary repairs of the basin for the ensuing year, would be likely to absorb the whole or the greater part of this balance, would the Court grant such a mandamus? And if the Company were in any year to do so improvident an act, as to a make dividend to the uttermost penny, not reserving any thing for prospective demands; as there is a provision in the act (*a*), enabling them to make calls from the proprietors for the necessary purposes of the act, the consequence would be, that instead of reserving out of the funds in hand, sufficient means to cover these expences, they must call upon the proprietors to refund what they had improvidently distributed among them. The language of the act is, "that the Company shall have power to make such calls of money from the proprietors of shares, to defray the expences of, or carry on the works autho-

(*a*) Sect. 37.

rised

1816.

The King *against* The Hull Dock Company.

rised by the act, as they from time to time shall find wanting and necessary for those purposes." So that the Company may call upon the proprietors of shares to refund what they have received. There is no question as to the rateability of this property, it has very properly been admitted that it is rateable. The question therefore is, whether a rate can be imposed in respect of property which is generally rateable, but the profits of which, owing to certain incidental and necessary expenses, have been for a time exhausted. As to which it is to be observed, that a rate is not always imposed on property in the particular year in which it makes a productive return, for if that were so, there could be no rate in respect of saleable underwoods and the like property, which are productive only after a series of years, except in those years in which the profits arose. But in the case of *Rex* v. *Mansfield*, it was decided, after much consideration, that saleable underwoods were rateable annually, in proportion to their value, though they should happen not to be cut down more than once in 21 years. In the present case, the Company have no money in hand, but they have a property, which upon an average is productive. To hold that in every case where property is rateable, an account is to be taken, for the particular period for which the rate is imposed, of the precise amount of its productiveness, and that if there is the smallest decrease, the rate is to be reduced *pro tanto*, would in my judgment be infinitely inconvenient. Every house must then have its separate assessment, in order to let in the particular deductions belonging to each; and this mode of assessment would be open to every species of fraud, because the largest deductions would be attempted to be thrown on periods of the greatest pressure. It ap-

pears

pears to me that this rate is well imposed, and that the average profits of the company are not liable to be merged in the partial expenditure of any particular period. I think, therefore, this order ought to be confirmed.

1816.

The King *against* The Hull Dock Company

BAYLEY J. I agree that this rate is well imposed. The case does not state that this property, *communibus annis*, is not productive of profit, but only that during this particular period it was not perceptible. It appears that the company are in possession of property which is *primâ facie* rateable; the rate, therefore, is well imposed, unless the property is to be exempted, on the ground of its not being profitable at the particular period for which the assessment is made. As to which, *Rex* v. *Mansfield* is an authority, that the principle which is to govern is, whether it be profitable *communibus annis*.

ABBOTT J. It has been admitted that the Company are in possession of property which is rateable generally, and that property is of considerable annual value. I think the Company cannot relieve themselves from this rate by shewing an account of some extraordinary expenditure during the particular period for which the rate is made, which would have gone to the account of profit, had it not been otherwise consumed. To hold to any such rule would, in my opinion, be productive of great inconvenience; for by the same rule, I know not what answer could be given to the landholder or householder, if they were to claim a similar exemption, because of the extraordinary expense which they had incurred in the maintenance or improvement of

1816.

The King *against* The Hull Dock Company.

of their house or land. Therefore, as it seems to me, the order of sessions must be confirmed; there is not any question before us as to the *quantum*.

Holroyd J. I am of the same opinion. The only doubt which I have entertained, has been on sect. 22., which obliges the Company to repair the dock and other works; and if, under that section, the specific rates had been, so far as they were required, appropriated to that purpose only, I should have entertained considerable doubt whether any property vested in the trustees, which could properly be made the subject of rate, beyond the surplus which might happen to remain in their hands, after satisfying the expenses attending the maintenance and repair of the works. But the case is not so, for I find, by the 42d section, the duties payable by virtue of the act are vested in the Company as their own proper monies, and for their use, in consideration of the expenses incurred by them in making and maintaining the works; and, by the 53d section, they are to take an account, annually, and declare what dividend shall be made; so that they stand in the same situation with any other canal company. If so, then here is property which is productive of profit, although it has not made any return during the time for which the rate is made; but it is not enough to exempt property from being rated, to shew, that the extraordinary expenses of a particular period have absorbed the profits of that period.

Order of sessions confirmed.

The KING *against* SHAWE.

Thursday, November 11th.

The statute 42 G. 3. c. 85. trying punishing Great B ersons l ublic e ments f offences mitted abroad, does not extend to felonies.

THE defendant was indicted in this court, to which indictment he appeared, and pleaded guilty, in the last term. The indictment charged that the defendant, being a person employed by and in the service of our lord the king, in a certain civil office and capacity, to wit, in the office and capacity of a clerk in the commissariat department of the king, out of *Great Britain*, to wit, at *Keene*, in *North America*, on the 14th day of *June*, 1815, at *Keene* aforesaid, to wit, at *Westminster*, in the county of *Middlesex*, in the execution and exercise of his said office and capacity, feloniously did steal, take, and carry away 5000 pieces of foreign gold coin, commonly called half joes, of the value of 10,000*l.*, of lawful money of *Great Britain*, and 2400 ounces of gold, of the value of 10,000*l.*, of like lawful money, of the goods, chattels, and monies of our said lord, the now king, there then found and being, against the form of the statute, &c., and against the peace, &c. Second count charged the felony to have been committed under colour of his office. Third and fourth counts were similar to the first and second, except that they stated the defendant to be a person employed in a military office and capacity, to wit, in the office and capacity of a clerk in the commissariat department of the army of the king, serving in *North America*. Fifth and last counts described him as a person holding and exercising a certain public employment, to wit, the public employment of a clerk in the commissariat department of the

king,

1816.

The King *against* Shawe.

king. And now, the defendant being brought to the bar of the court,

Selwyn and *Gifford* moved, in arrest of judgment, upon the ground, that the offence charged in the indictment was not an offence within the stat. 42 G. 3. c. 85, "for the trying and punishing, in *Great Britain*, persons holding public employments, for offences committed abroad;" for the statute speaks only of "any crime, misdemeanor, or offence, in the execution, or under colour, or in the exercise of their office or employment." But wherever it has pleased the legislature to extend the limits of trial beyond the common law limits, and to include felonies in that extension, it has uniformly done so in express terms. And they instanced the 26 *H.* 8. *c.* 6. *s.* 12, for the trial of murthers, robberies, felonies, and accessaries, the 26 *H.* 8. *c.* 13. *s.* 4., for the enquiring of treasons, and the 28 *H.* 8. *c.* 15., for the trial of "treasons, felonies, robberies, murthers, and confederacies;" wherein all these offences are specified *eo nomine*. And the stat. 11 and 12 *W.* 3. *c.* 12., which is in *pari materiâ* with the statute in question, being for the punishment of governors of plantations, for crimes committed by them in the plantations, extends to any oppression of his majesty's subjects, or any other crime or offence, contrary to the laws of this realm, or in force within their governments; yet it has never been considered as including felonies. It is to be observed, also, that the statute 42 *Geo.* 3. provides for the prosecution of the offences mentioned in it, by information to be exhibited by the Attorney-General, as well as by indictment; which plainly manifests the intention of the act, because an information lies not for a felony.

The

1816.

The King *against* Shawe.

The Court desiring to hear the other side,

The *Attorney-General*, *Topping*, and *Richardson*, *contrà*, quoted the act 13 *Geo.* 3. *c.* 63., for a legislative exposition of the word "crime;" for the 39th section of that act is confined to "crime, misdemeanour, or offence," yet it plainly appears, by the the proviso in the 45th section, that the legislature meant to apply it to *capital* cases.

Lord ELLENBOROUGH C. J. The reason of the thing, *à priori*, would lead one to conclude, that the jurisdiction, as to the trial of felonies, should be restrained to the local court. The word *crime* may, indeed, where a different reason ought to prevail, be of a larger construction, so as to comprehend felonies. But what Mr. *Gifford* has noticed with respect to proceeding by information, is, as it seems to me, decisive, to shew that felonies were not contemplated by this act. The 13 *Geo.* 3. was passed *alio intuitu*. The utmost to which the argument arising from that enactment can be carried is this, that the word crime may mean felony, if, as it is said of that statute, it is so intended. The words of the act of parliament in question will, however, be best expounded by looking to the act itself. The object of this act was, in the same spirit with the act of 11 and 12 *W.* 3., to protect his majesty's subjects against the criminal and fraudulent acts committed by persons in public employments abroad, in the exercise of their employments; to reach a class of public servants, which the 11 and 12 *W.* 3. *c.* 12. did not reach; and to place them *in pari delicto* with governors.

1816.

The King *against* Shawe.

vernors. It has no reference, in spirit or letter, to the commission of felonies.

Abbott J. I am entirely of the same opinion. It is quite clear from the whole scope and language of the stat. 42 *Geo.* 3. c. 85. that the legislature did not intend to extend it to felonies. It is said, however, that the word crime in another act does comprehend felonies; admitting that it does, yet the words of every act of parliament must be construed according to the intent of the particular act. They may bear a more extensive signification upon one occasion than what would be given to them, if left to their natural import, in another.

Per Curiam. Prisoner discharged.

Thursday, November 14th.

Henderson *against* French.

A prohibition lies to the consistory court, if it proceed to hear exceptions to an inventory exhibited by an executor.

A RULE nisi, for a prohibition to the Consistory Court of *Carlisle*, was obtained on behalf of *Mary Henderson*, executrix of *J. Henderson* deceased, who was sued as such executrix in the name of the Judge of the said court, at the instance of *A.* and *B.*, creditors of the said *J. H.*, and exhibited an inventory in the said court of all the goods, &c. of the said deceased.

And the ground on which the rule was moved was, that the Ecclesiastical Court were proceeding to hear exceptions to the said inventory, and to compel her to exhibit a fresh one:

To which it was answered by *Littledale*, who now shewed cause, that such had been the course and prac-

tice

1816.

HENDERSON *against* FRENCH.

tice of the Court from time immemorial, and copies of divers entries of the like proceedings in the said court, from the year 1636 to 1812, were produced, and verified by affidavit. And in this case it was said, that the executrix had confessed that the inventory was insufficient; for it appeared by the proceedings that she had exhibited a supplemental inventory. But surely the statute (*a*), which requires executors to "make a true and perfect inventory," must be presumed to have armed the Court with the power of examining how far it is perfect or true; in like manner as in making an account to the Ordinary. As to which, *Swinburne* (*b*) says that it appertains to the office of ordinary, not only to examine the account and see whether it be rightly calculated, and whether the accountant doth charge himself with the receipt of the whole goods and chattels of the testator, and how much he hath disbursed; but also to have a regard what manner of expenses the accountant requireth to be allowed. And after due examination of the account, the Ordinary finding it to be true and perfect, may pronounce for the validity of it. But if on examination it appears that the executor hath not dealt faithfully, the account is to be rejected. And although in *Catchside* v. *Ovington* (*c*), it was considered that the spiritual court had not jurisdiction to question an inventory, it may be observed, that that was in the case of an inferior ecclesiastical court, and in a suit promoted by a creditor.

Scarlett, contrà, cited 21 *H.* 8. *c.* 5. *s.* 4., which, as he contended, only requires an executor to make an

(*a*) 21 *H.* 8. *c.* 5. *s.* 4. (*b*) Part 6. *s.* 20. (*c*) 3 *Burr.* 1922.

 inventory,

1816.

HENDERSON *against* FRENCH.

inventory, and deliver it into the keeping of the bishop or ordinary.

The Court were of opinion that, as the statute directed the executor, for the security of creditors and legatees, to make an inventory to be delivered to the bishop or ordinary; and that no bishop or ordinary should, under pain of 10*l*., refuse to take such inventory, his office was merely ministerial, to receive it when tendered; if the statute had intended more it would have so said.

Rule absolute

Friday, November 15th.

The Rev. SAMUEL PARIS, Clerk, THOMAS ARNOLD, ANN WATTS, Widow, ELIZABETH WATTS, and HENRY WATTS, Plaintiffs;

AND

GEORGE MILLER, WILLIAM DEEMING, and CAROLINE, his Wife, - - Defendants.

Where testatrix being seised in fee of an undivided fifth part, and of a moiety of another undivided fifth part, devised "my *share* of the Bastile and other estates, situate at *C.* and now in the occupations of *T.* and *C.*, to my sister, *C. W.*," this was held to

ARABELLA WATTS being seised in fee of one undivided fifth-part, and a moiety of another undivided fifth-part of the estate and premises hereinafter mentioned, devised as follows: "I give and bequeath my share of the *Bastile* and other estates situate at *Coventry*, and now in the occupations of Mr. *Twycross*, Mr. *Cope*, and Mr. *Twist*, to my sister *Caroline Watts*." The testatrix died, leaving her sister, the defendant, *Caroline Deeming*, then *Caroline Watts*, her surviving.

Upon

1816.

PARIS *against* MILLER.

Upon this devise a question was submitted by the Vice-Chancellor to this Court, what estate *Caroline Deeming* took in the said one undivided fifth-part, and a moiety of another undivided fifth part under the said will.

Phillipps, for the plaintiffs, argued that she took but an estate for life. He said, that there being no introductory words whence the intention of the testatrix could be collected, the devise must be construed according to its own import; as to which the rule of law is, that a fee does not pass without words of limitation, or some expression tantamount. Of this nature are the words "*estate*," and "*estate at*;" but a devise of *all my lands* passes only a life estate. And if a devise be to *A.* in tail, and to *B.* and other children, other lands in tail, and if any child die within age and unmarried, his *part* shall go to the survivors; the survivors take such part only for life. (*a*) So a devise of his *share* in the *New River*; the devisees take only for life, for *share* imports his part only, not his estate or interest in it. (*b*) And in *Fawcet's* case (*c*), if a man seised of a house and land, devise the moiety of his house to his wife for life. Item, he deviseth the other moiety of his house to *J.* his second son. Item, he devised to *J.* his second son, the said house and all the lands which pertain to it after the death of the wife; it was adjudged, that *J.* should have an estate for life only after the death

(*a*) *Pettiwood* v. *Cooke*, *Cro. Eliz.* 52. *S C.* 3 *Leo.* 180. by the name of *Putnam* and *Cook*'s case. *S. C.* 2 *Leon.* 129. by the name of *Hawkins*'s case. *S. C. ibid.* 193. *Woodward* v. *Glasbrook*, 2 *Vern.* 388. *Com. Dig. Devise*, (N. 7.)

(*b*) *Middleton* v. *Swayne*, *Skinn.* 339.

(*c*) *Vin. Abr.* tit. *Devise*, L. a. *pl.* 11.

1816.

PARIS *against* MILLER.

of the wife, and not an estate in fee. And though in *Bebb* v. *Penoyre*(a), Lord *Ellenborough* appears to have doubted the conclusion come to in *Pettiwood* v. *Cooke* above cited, he expressly states, that it was not necessary to decide the matter then in judgment upon that point. Then if the word *share* be insufficient to pass a fee, the subsequent words of the devise will not carry it farther; because, it appears that the word *estates* is used in a sense descriptive of the thing devised, and not of the interest which the testatrix had in them; it being in the plural, and followed by words designating the occupation. And according to Lord *Hardwicke*, in *Goodwyn* v. *Goodwyn* (b), "There is no case in which it has been held, that a fee passed by the devise of an *estate*, if the testator added to it, in the occupation of any particular tenant."

Lord ELLENBOROUGH C. J. Is not this a question rather of grammatical construction of the word *share* than any thing else? This is not the devise of a portion which the devisor has carved out of the entirety; it existed in her as it is devised. The words "my share," as it seems to me, were used as denoting the interest; those which follow, the thing devised and its locality, and the latter words which describe the occupation relate to the last antecedent, namely, the estates, and not to the word share. It appears to me, that the word *share* passes the fee.

(a) 11 *East*, 160.
(b) 1 *Ves.* 228. cited by Lord *Kenyon* in *Fletcher* v. *Smiton*, 2 *T. R.* 659.

ABBOTT

1816.

PARIS *against* MILLER.

ABBOTT J. In the case cited from *Vernon*, the devise was to the sons and the heirs of their bodies; the word share afterwards used in that case, could not possibly denote the same estate as given to them, but must have necessarily meant a part of, and not the interest in the thing.

Horne was to have argued for the defendants.

The following certificate was afterwards sent.

We have heard this case argued by counsel, and are of opinion, that the said defendant, *Caroline Deeming*, took an estate in fee in the said one undivided fifth part, and in a moiety of another undivided fifth part of the said estate and premises under the said will.

ELLENBOROUGH.
J. BAYLEY.
C. ABBOTT.
G. S. HOLROYD.

MILNES and Others *against* BRANCH.

Friday, November 15th.

Where *J. B.*, being seised in fee, conveyed to defendant and *T. J.*, their heirs and assigns, to the use that *J. B.*, his heirs and assigns, might have and take to his use a rent certain to be issuing out of the premises, and subject to the said rent, to the use of defendant, his heirs and assigns, and defendant covenanted with *J B.*, his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build, within one year, one or more messuages on the premises, for better securing the said rent, and *J. B.* within one year demised the said rent to plaintiffs for 1000 years: Held, that covenant would not lie for the plaintiffs for non-payment of the rent, or for not building the messuages, for the covenant was personal to *J. B.*

COVENANT. The plaintiffs declare, that, by indenture of the 20th of *June*, 1805, between one *Joshua Barnsley*, of the first part, one *J. Robinson*, a trustee for *J. Barnsley*, of the second, the defendant of the third, and one *J. Jackson*, a trustee for the defendant, of the fourth, (reciting indentures of lease and re-

1816.

MILNES *against* BRANCH.

lease, whereby a plot of land was conveyed to one *P. Hope*, and the said *J. Barnsley*, their heirs and assigns, as to one undivided moiety, to the use of such person and persons, and for such estate, &c., as *P. Hope* should, by deed in writing, duly executed, &c., limit or appoint, and, in default of such appointment, after the decease of *P. Hope*, to the use of the right heirs of *P. Hope* for ever; and as to the other undivided moiety, to the like use, with respect to *J. Barnsley;* subject to the yearly rent of 42*l.*, payable to the relessors; and reciting also, other indentures of lease and release, whereby the said *P. Hope* limited and appointed to *J. Barnsley* and *J. Robinson*, and the heirs and assigns of *J. Barnsley*, his undivided moiety in the plot of land, and also in four messuages, then lately built thereon, in trust, as to the estate of *J. Robinson*, for *J. Barnsley*, his heirs and assigns for ever, subject to the rent covenants, &c. reserved and contained in the former release; and farther reciting, that the defendant had contracted with *J. Barnsley* for the purchase of the plot of land and messuages, subject to the yearly chief rent of 86*l.* 3*s.* 3*d.*,) the said *J. Barnsley*, by virtue of the said power, limited and appointed one undivided moiety in the plot of land and messuages, to remain to the defendant and *J. Jackson*, their heirs and assigns for ever; and for the farther assuring the same, and to convey and assure the other undivided moiety, and in consideration of the yearly rent and covenants, &c. on the part of the defendant, his heirs, executors, administrators, and assigns, to be paid and performed, and also of 5*s.* paid by the defendant to *J. Robinson*, *J. Barnsley*, and *J. Robinsou* (according to their several estates) the said *J. Barnsley* did grant, bargain, sell, alien, enfeoff, and confirm

1816.

MILNES *against* BRANCH.

confirm to the defendant and *J. Jackson*, and the heirs and assigns of the defendant, all that plot of land, &c., and six messuages built thereon, &c., and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, &c. of them the said *J. Barnsley* and *J. Robinson*, habendum to the defendant and *J. Jackson*, their heirs and assigns, to the use, intent, and purpose, that *J. Barnsley* and *J. Robinson*, their heirs and assigns, might have, receive, and take, to the use and behoof of *J Barnsley* and *J. Robinson*, and the heirs and assigns of *J. Barnsley* (nevertheless, as to the estate of *J. Robinson*, in trust only for *J. Barnsley*, his heirs and assigns for ever) the clear yearly rent of 86*l.* 3*s.* 3*d.*, to be issuing out of the premises, by equal half yearly payments on the 24th of *June* and 25th of *December*, with power of distress and entry for recovery thereof, to *J. Barnsley* and *J. Robinson*, and subject to the above rent, and powers for recovery thereof, to the use of the defendant and *J. Jackson*, and the heirs and assigns of the defendant, for ever, (nevertheless as to the estate of *J. Jackson*, in trust only for the defendant, and his heirs and assigns,) and the defendant did for himself, his heirs, executors, and administrators, covenant with *J. Barnsley* and *J. Robinson*, and the heirs and assigns of *J. Barnsley*, that he, his heirs or assigns, would pay to *J. Barnsley* and *J. Robinson*, and the heirs and assigns of *J. Barnsley* for ever, the said yearly rent, and also that he, his heirs and assigns, would, within one year next ensuing the date of the indenture, erect, build, and finish, in a good and substantial manner, and for ever support and maintain, upon the plot of land, one or more messuages or other buildings, of good brick or stone, or both, set in good

1816.

MILNES *against* BRANCH.

good lime mortar, and covered with slates, which at the time of finishing, and at all times thereafter, should, together with the messuages conveyed, be of the clear yearly value of double the yearly rent thereby reserved, at the least, over and above all reprises, and, in case of fire, tempest, destruction, or decay, should rebuild the same, so that at all times, for ever, the buildings then erected and to be erected, should continue of the clear yearly value of double the yearly rent thereby reserved at the least, for the better security of the yearly rent thereby reserved; and *J. Barnsley* and *J. Robinson* constituted their attorney, to deliver seisin to the defendant and *J. Jackson*, according to the indenture, which was accordingly done. *And* J. Barnsley *and* J. Robinson *being so seised of the rent aforesaid, within one year next ensuing the date of the said indenture, viz. on the 24th of* June, 1805, *by indenture of that date, demised to the plaintiffs, their executors, administrators, and assigns, the said rent of* 86l. 3s. 3d., *and all their interest in the same for* 1000 *years.* And the plaintiffs assign for breach a year's rent in arrear on the 24th of *June*, 1814, and also, that the defendant or his assigns, did not, within one year next ensuing the date of the first-mentioned indenture, nor at any other time, erect, build, or finish, in a good and substantial manner, or otherwise howsoever, upon the plot of land or any part thereof, one or more messuages, &c., which at the time of finishing was or were, or at any times thereafter hath or have been with the other messuages conveyed of the clear yearly value of double the yearly rent at the least, &c.

The defendant prayed oyer of the indenture, and demurred to the declaration. Joinder.

Richardson,

1816.

MILNES *against* BRANCH.

Richardson, in support of the demurrer, argued, that the plaintiffs were not entitled, either at common law, or by virtue of the stat. 32 *H.* 8., to maintain, as assignees of the rent, this action against the defendant. The statute speaks only of such as are grantees of the reversion, giving them the like advantages against the lessees as the lessors and grantors had. But this defendant, who takes by a conveyance of the fee simple, is not a lessee, neither are the plaintiffs grantees of the reversion, like tenant for life in remainder. (*a*) And although an assignee of part of the estate may maintain covenant, yet these plaintiffs have nothing in the land, but only the rent, and the covenant as to the rent is personal, to *Barnsley*, who alone shall have covenant. And so it was adjudged, that if *A.* grant a rent-charge to *B.* for the life of *C.*, *habendum* to *B.* his heirs and assigns, to the use of *C.*, and *A.* covenant to pay it, *ad usum C.*, if the rent be behind, *B.* may have an action of covenant against *A.*; for though the rent-charge is executed by the statute, and the power of distraining, as incident thereto, transferred to *C.*, yet the covenant being collateral, is not transferred nor discharged, but remains with *B.* (*b*)

Littledale, contrà., compared this to the grant of a rent-charge by the owner of the fee, who covenants with the grantee to pay the rent, in which case he said, if the rent be assigned, covenant will lie for the assignee; and for this he quoted the opinion of Lord *Holt*, in *Brewster* v. *Kidgill* (*c*); wherein he takes the distinction between the assignee of the land and the assignee of the

(*a*) *Isherwood* v. *Oldknow*, 3 *M.* & *S.* 382.
(*b*) 1 *Mod.* 223. 2 *Mod.* 138. *S. C.*
(*c*) Ld. *Raym*, 317. *Salk.* 198. 5 *Mod.* 369.

the

1816.

MILNES *against* BRANCH.

the rent. "If," says he, "tenant in fee grant a rent-charge out of lands, and covenant to pay it without deduction for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against his assignee; for it is a mere personal covenant, and cannot run with the land." And again (*a*), "There is another matter, that is, whether the terre tenant, in this case, be obliged by the covenant; this is a covenant by the grantor of the rent, who was seised in fee of the manor. Now who this terre tenant is does not appear, whether he be heir or assignee; for if he be assignee, I do not think him chargeable in law, for this covenant doth not run with the land. *I make no doubt but that the assignee of the rent shall have covenant againstthe grantor, because it is a covenant annexed to the thing granted.*" And if the heir or executor, as representative of the grantee by operation of law, might have this action, by parity of reason, the plaintiffs, who are his representatives by special assignment, may also have it. Therefore, where a man made a feoffment in fee by indenture, reserving rent, &c., and covenanted, that if the feoffee, his heirs or assigns, should be distrained to do more services than were reserved in the deed, then it should be lawful for the feoffee, his heirs, and assigns, to distrain in his manor of *D.*, &c. The feoffee made feoffment over, and it was adjudged that the second feoffee might distrain, for the covenant ran with the land. (*b*) And as rent may be assigned, as well as the land, upon which the assignee shall have the like remedies of assise, mort d'ancestor, and novel disseisin, by the same analogy this covenant may be said to run with the rent.

(*a*) 12 *Mod.* 170.

(*b*) Anon. *Moor*, 179.

Lord

1816.

MILNES against BRANCH

Lord ELLENBOROUGH C. J.. I am inclined to think that the language of Lord *Holt*, as to the right of the assignee of the rent to have covenant, was extra judicial; and putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shewn that this is land; it might as well be applied to any covenant respecting a matter merely personal. The stat. *H.* 8. recites that, at common law, such only as are parties or privies to any covenant can take advantage of it; here is neither privity of contract, nor privity of estate; the rent is reserved out of the original estate.

BAYLEY J. I am entirely of the same opinion. The argument for the plaintiffs loses sight of the conveyance by which this rent is created. It is incorrect to state it as a rent charge granted by the owner of the fee; it being a conveyance in fee by *Barnsley* and *Robinson* to the defendant to certain uses, one of which is, that they shall receive the rent; so that the rent arises out of the estate of the feoffors. It is therefore not a grant by the owner of the fee, and the covenant is a covenant in gross.

ABBOTT J. concurred.

HOLROYD J., having been of counsel in the case, declined giving any judgment.

Judgment for the defendant.

1816.

Friday, November 15th.

BROTHERSTON and Another *against* BARBER.

Insurance on ship from *Rio de Janeiro* to *Liverpool*, and the ship was captured, and afterwards re-captured, but in the interval, the assured having received intelligence of the capture, gave notice of abandonment, and after the recapture, the ship arrived at *Liverpool*, having sustained a partial damage, and action brought to recover a total loss: Held, that the assured could only recover for a partial loss.

ASSUMPSIT upon a policy of insurance upon the ship *Fanny*, on a voyage from *Rio de Janeiro*, or any port or ports in the *Brazils* to *Liverpool*, and the plaintiff averred a loss by capture. Plea, non-assumpsit. The defendant paid into court 20 per cent. upon his subscription. At the trial before *Le Blanc* J. at the spring assizes at *Lancaster*, 1815, there was a verdict for the plaintiffs for the whole amount of the defendant's subscription, subject to the opinion of the Court upon the following case:

The ship sailed from *Maranham* in the *Brazils*, without convoy, bound to *Liverpool*, on the 8th of *March*, 1814, having part of her cargo on board belonging to the plaintiffs, and the remainder of her cargo belonging to other shippers, subject to freight payable to the plaintiffs. On the 19th of *April* the ship was captured by an *American* privateer off the coast of *Ireland*. On the same day the privateer fell in with a *Portuguese* vessel bound for *Liverpool*, on board of which the captain and part of the crew of the *Fanny* were put, and they arrived at *Hoylake*, near *Liverpool*, on the 23d of *April*. The captain of the *Fanny* finding it impossible to get to *Liverpool* that day, informed the plaintiffs by letter of that date of the capture. A copy of this letter was, on the 25th, handed by the plaintiffs to the insurance brokers employed to effect the insurance, together with a letter of notice, that the plaintiffs abandoned the ship, and all their interest in her, which the brokers

1816.

BROTHERSTON *against* BARBER.

brokers communicated to the defendant. The *Fanny*, with her cargo on board, were re-captured on the 12th of *May* following, by his majesty's ship *Sceptre*, of which the plaintiffs received information on the 15th *June* following, and communicated the same to the defendant. The *Fanny* and her cargo arrived at *Gravesend* on the 24th of *June*, and at *Liverpool* on the 26th of *September* following, not having been in any port from the time of the capture, and her cargo was delivered at *Liverpool* to the consignees. The latitat issued on the 10th of *November*, and the declaration was filed in *Michaelmas* term 1814.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover as for a total loss. If the loss was only partial, the verdict was to be reduced to 8*l.* 8*s.* 4*d.*, the amount of such partial loss beyond the sum paid into court.

Littledale contended that the plaintiffs, notwithstanding the re-capture, were entitled to insist on their abandonment, and to recover as for a total loss. And he mainly relied on this, that the abandonment was made at a period when the loss was an actually subsisting total loss, and not merely so in the *bonâ fide* contemplation of the parties; which, he said, differed the case at bar from *Bainbridge* v. *Neilson* (a), *Falkner* v. *Ritchie* (b), *Anderson* v. *Wallis* (c), *Parsons* v. *Scott* (d), and almost all the cases in which the risk of the assured after abandonment had been held to be subject to the variation of events. But if this is to be considered as a general

(a) 10 *East*, 329.
(b) 2 *M. & S.* 290.
(c) 2 *M. & S.* 240.
(d) 2 *Taunt.* 363.

rule

1816.

BROTHERSTON *against* BARBER.

rule operating upon every case of abandonment, it may be asked, of what use is abandonment, and how came it into practice? The practice is irreconcilable with any other doctrine than that abandonment is conclusive, wherever the assured, at the time of making it, is in a complete condition to insist upon a total loss; in which case he may abandon, and demand his indemnity *instanter*. And suppose the plaintiffs in this case had so done, and the loss had been adjusted, or upon refusal to adjust this action had been commenced, before the recapture, would that event have abated the action or opened the adjustment? If not, it follows that the right to demand a total loss, and consequently to cast by abandonment upon the underwriter the remaining risk, whatever that might be, was well vested in the plaintiffs; and if they had such right, it cannot be in the option of the underwriter to choose whether or not he will accept the abandonment. In *Smith* v. *Robertson* (a), upon appeal from the court of sessions in *Scotland*, where judgment had passed for the owners, on the ground that by notice of abandonment the transaction closed, this judgment was affirmed in *Dom. Proc.* on a different ground indeed, but Lord *Eldon* appears to have doubted the propriety of the decisions in *Bainbridge* v. *Neilson*, and *Falkner* v. *Ritchie*.

Richardson, contrà, observed that the judgment in *Smith* v. *Robertson* was affirmed in *Dom. Proc.*, upon the ground, that the underwriter had acquiesced in the abandonment, so that it was out of the principle now contended for by the plaintiffs. And he cited *M'Carthy* v.

(a) 2 *Dow*, 474.

Abel

1816.

BROTHERSTON *against* BARBER.

Abel (*a*) as an authority to shew, that, notwithstanding an abandonment of freight made pending the existence of circumstances which amount to a total loss, yet, if freight be, in the events which afterwards happen, fully earned, no loss can properly be demandable against the underwriter. And he insisted upon the reasonableness of such a position, an insurance being purely a contract of indemnity: whence it followed that the assured could never be entitled to recover for a total loss, when the event has decided that the loss is but partial, or perhaps no loss at all. In support of which reasoning he quoted *Hamilton* v. *Mendez* (*b*), and *Godsal* v. *Boldero.* (*c*)

Lord ELLENBOROUGH C. J. The cases which have been the subject of this day's observation have all taken root in the doctrine of Lord *Mansfield* in *Hamilton* v. *Mendez*, in which it is laid down, that an assured can only demand an indemnity; and, consequently, his action must be founded upon the nature of his damnification as it really is at the time the action is brought. Now, if we enquire as to the nature of the injury sustained by this capture, followed by the recapture, what was it at the time when this action was brought? It seems to me, that the only injury was a retardation of the voyage during the time the ship was in the enemy's custody, and was diverted from her course to *Liverpool*, the amount of which has been ascertained to be 8*l.* 8*s.* 4*d.* *ultra* what has been paid into court. In cases of capture, a *spes recuperandi* exists: it is not as if the ship

(*a*) 5 *East*, 388.
(*b*) 2 *Burr.* 1198. 1 *Black. R.* 276.
(*c*) 9 *East*, 72.

1816.

BROTHERSTON *against* BARBER.

were sunk to the bottom; there must be always a greater or less degree of probability that she may ultimately be recovered; of which advantage the assured certainly ought not to be ousted. By notice of abandonment the assured made an offer, which remained executory; and in this suspended state of things, considering this as a contract of indemnity, the assured had a right to look to intervening accidents, which might chance to restore them *de integro* to their former situation. The policy does not make any special provision for the case of abandonment; but the law says, that the underwriter shall indemnify: which, if the sum subscribed were nicely calculated to the exact value of the thing insured, would be effected, in the event of a total loss, by paying the entire sum. I cannot consider a notice of abandonment as an executed contract, particularly since the passing of the registry acts, which require several things to be done to perfect the transfer, and to make the title complete. An offer on the one side, acceded to on the other, may have the effect of closing the transaction, as in the case determined in the House of Lords. But what has been done here to preclude either the assured or underwriter from availing themselves of intervening events? *Bainbridge* v. *Neilson*, and other cases, have determined that the assured may be remitted to his situation *de integro* by the recapture; and certainly, unless we are to consider this as a wagering contract, instead of a contract for indemnity, the reason of the thing requires that it should be so: for the value of the thing abandoned to the underwriter might in some instances infinitely exceed, and in others fall short of, the sum insured. But I do not find it laid down that either the underwriter or the assured is to be a gainer in any way by this contract.

1816.

BROTHERSTON against BARBER.

tract. Unless, therefore, the principle of indemnity is to be changed for one of hazard and gambling, it seems to me that these plaintiffs must stand, in regard to their claim for indemnity, in the position in which subsequent events have placed them, at the time when they come to demand it; that is, when the action is brought. The same principle, though not with reference to an abandonment, governed the decision of *Godsal* v. *Boldero*. The Court there considered, that although a total loss had happened, so far as it regarded the risk insured, yet as that loss had been redeemed by subsequent circumstances, the assured had no cause of action upon his contract for indemnity; and, there also, the Court referred to the language of Lord *Mansfield* in *Hamilton* v. *Mendez*, who developes the true principle and object of such an assurance. It seems to me, therefore, that this not being an abandonment of such a nature as to preclude the assured from resuming all their rights *de integro* in the ship, the underwriter shall not be made answerable for a total loss.

BAYLEY J. I think the plaintiffs are not entitled to recover more than the 8*l.* 8*s.* 4*d.* beyond the sum paid into court; that is, the amount of the damnification at the time when the action was brought. This is a contract of indemnity only; the ship was captured in the course of her voyage. Now, capture is an event which may or may not terminate in a total loss: if it continue and terminate in a total loss, the assured will be entitled to his full indemnity; but if the capture be only temporary and the loss partial, it would be against the spirit as well letter of the contract to hold the underwriter bound to take to the subject-matter insured, and to allow the

 assured,

1816.

Brotherston *against* Barber.

assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription, while the subject-matter insured subsists in perfect safety. What is it that is thus to entitle the assured to demand more than the safety of the thing insured? It is said that abandonment gives this right, by closing the transaction between the underwriter and assured. But notice of abandonment is no more than a proposal on the part of the assured; which the underwriter may accept, and then there will be a new agreement between them binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary, and cannot amount to a total loss, if, by subsequent events, it has become otherwise at the time of action brought. It is unnecessary to give any opinion as to how the case might be, if the loss, continuing total at the time when the action is brought, became a partial loss only at the time of trial. It is enough, here, that the thing remained in safety to the assured at the time when this action was brought, and the loss was only temporary. Consequently the verdict for the plaintiffs must be entered for the limited sum only.

Abbott J. I am of the same opinion, and think the verdict ought to be entered only for a partial loss. It appears by the case that the ship was captured; that the plaintiffs, having information of it, gave notice of abandonment, which I consider as tantamount to an offer on their part. The ship was afterwards recaptured and brought into port, and then this action is commenced; and the plaintiffs, notwithstanding the recapture and safe return of the ship after performing her voyage,

1816.

BROTHERSTON *against* BARBER.

voyage, seek to recover as for a total loss. It is not, I think, argued that the capture only, without abandonment, would have entitled the plaintiffs to recover a total loss; the claim is founded on the notice of abandonment. But the great principle of the law of insurance is, that it is a contract for indemnity. The underwriter does not stipulate, under any circumstances, to become the purchaser of the subject-matter insured; it is not supposed to be in his contemplation: he is to indemnify only. This being the principle, it seems to me that any practice or doctrine which is calculated to break in upon it ought to be narrowly watched. The doctrine of abandonment is of this natnre. It has not been stated, that there is any decision in the courts of this country giving effect to an abandonment like the present, so as to entitle the assured to a total loss, though the thing insured is restored and in safety. I have not discovered any such decision; and upon referring to *Emerigon* (*a*), who collects almost all that is to be found upon the subject in the foreign writers, I observe there is a great contrariety of opinion as to the cases in which abandonment is to be deemed absolute. He puts the case of abandonment, where the ship is afterwards repaired and brought home at the expense of the underwriter, in which case he says the underwriter cannot throw her back upon the assured; but he adds, that *Valin* is of a different opinion, and that the practice of *Italy* is otherwise: for there it is sufficient if the underwriter make good the dannification. (*b*) It is not necessary to carry the doctrine to this length; but as we are not bound by any decision in our own

(*a*) See *Traité des Assurances*, ch. 17. (*b*) See *ibid.* ch. 17. s. 6.

courts,

1816.

Brotherston against Barber.

courts, nor do foreign courts appear to afford any, I feel myself at liberty to decide, on general principles applicable to a contract of this nature, that the plaintiffs are not entitled to recover for a total loss. I am aware of the difficulty that has been suggested if the ship should be restored after the action is brought; as to which it will be better at present to forbear giving any opinion.

Holroyd J. I am also of opinion that the plaintiffs are entitled to recover only for a partial loss. It is clear that a policy of insurance, both in its object and form, is merely a contract of indemnity. It contains no stipulation respecting abandonment; though there is a clause authorising the assured, in case of any loss or misfortune, to sue labour and travel for the recovery of the ship, and that the assurers will contribute to the charges. Abandonment has its origin from the contract's being a contract of indemnity. But it is apparent that if the assured might abandon at his pleasure, he might be a gainer to a much greater extent than the value of the loss; which is inconsistent with a contract of indemnity. What, then, is the loss which the assured in this case have sustained? It is a loss arising out of the capture of the ship; and if the ship had been conveyed *infra præsidia* of the enemy and condemned, this loss would have been total: but as events have made it at the time when the action was brought, it is but a partial loss. I am not aware that, in any case, a plaintiff can recover larger damages than what he has sustained at the time of bringing the action. Upon these grounds, therefore, it seems to me, that the verdict for a total loss cannot be supported.

Verdict to be entered for the lesser sum.

1816.

WHITEHEAD against WYNN.

Tuesday, November 19th.

In debt upon stat. 43 *G.* 3. c. 84. s. 12. for wilfully absenting himself from his benefice, the venue must be laid in the county where the offence is committed. The stat. 31 *Eliz.* c. 5. extends as well to offences of omission as of commission.

ERROR to reverse a judgment of the Common Pleas. The venue was laid in *London*, and the plaintiff below declared, that whereas after the passing of the 43 *G.* 3., intituled, &c. and also after the 1st of *January*, 1801, to wit, on, &c. the defendant was a spiritual person, and vicar of the vicarage and parish church of *All Saints*, in *Cambridge*, in the county of *Cambridge*, and was possessed of the said benefice; and that being such spiritual person, and so possessed of the benefice, not regarding the statute, he did, after the passing of the said act, and after the 1st of *January*, 1804, without sufficient cause, and not having any such licence or exemption as in the 43 *G.* 3. mentioned for that purpose, *wilfully absent himself from his said benefice* for the whole of the year 1812; and did, during all that period, make his residence and abiding at some other place or places, and not at any other dignity, prebend, benefice, donative, perpetual curacy, or parochial chapelry of which he was possessed, contrary to the form of the statute. And the plaintiff avers, that during the time the defendant so absented himself, the annual value of the benefice, deducting all outgoings, except any stipend paid to any curate, amounted to 150*l.*; and by reason of the premises, and by force of the statute, an action hath accrued to the plaintiff, to demand and have of the defendant, 112*l.* 10*s.*, being three-fourths of the annual value, &c.

1816.

WHITEHEAD *against* WYNN.

There were other counts varying the period of the defendant's absenting himself. Judgment by *nil dicit.* And the errors assigned were (*inter alia*) for want of a proper venue to the declaration. Joinder.

Taddy, in support of the error assigned, objected that this being a penal action, the venue, according to stat. 31 *Eliz. c.* 5., ought to have been laid in the county where the offence was committed, which appears by the declaration to be *Cambridgeshire.*

Heath, contrà, being called upon by the Court, denied that the stat. 31 *Eliz.* applied to this case, the penalty sought being for an omission, viz. non-residence; whereas the statute applies only to cases of commission. And in support of this construction, he quoted sect. 2., which speaks of "offences *done and committed*, and that the defendant may traverse that the offence was *not committed* in the county." But this offence, by statute 43 *G.* 3. *c.* 84. *s.* 12., consists of two branches: 1st, the wilfully absenting himself from his benefice; 2dly, the making his residence at another place: the latter of which only can properly be called an act done, the former, upon which the penalty attaches, being a non-feazance; and, as such, it is not within the stat. *Eliz.*, as appears by the case of *Grimstone* v. *Molineux.* (*a*)

Taddy, in reply, observed that the case from *Hob.* was merely a note of the reporter, and not given as a decision; and referring to sect. 7., which expressly includes offences of omission as well as commission, he

(*a*) *Hob.* 251.

denied

denied that the statute 31 *Eliz.* was to be restrained in its construction as the plaintiff would have it; and if it were, the present cause of action was for a misfeazance, and not a non-feazance only. And he cited *Barber* v. *Tilson* (a), where a penalty for the continuing in charge of a vessel without being duly licensed was held within the statute, as to the locality of its venue.

Lord ELLENBOROUGH C. J. I cannot consider this as an offence of omission as contradistinguished from one of commission. It is like the case of departure from the dwelling, which, when coupled with an intent to delay creditors, is an act of bankruptcy: so his absenting himself is, in effect, a departure from the benefice; it is a positive act, though expressed in negative terms, if it be necessary to go with such critical nicety into the nature of the act complained of. But I think that it is not necessary; because the statute *Eliz.*, as it seems to me, was intended to apply to all offences against penal statutes, and not to those only where the offence is not constituted by negative words. The inconvenience of the construction contended for by the plaintiff would be enormous; for, according to that, the venue might be laid in *Cornwall* for non-residence in *Cumberland*. As to the case from *Hobart*, the point does not appear to have been touched by the Court; it is merely a note subjoined by the reporter.

BAYLEY J. I am also of opinion that the venue in this case is improperly laid, and I agree in the construction put upon the statute *Eliz.* by my Lord. The words of

(a) 3 *M.* & *S.* 429.

the

1816.

WHITEHEAD *against* WYNN.

the statute are, "That in any declaration or information, the offence against any penal statute shall not be laid to be done in any other county but where the contract or other matter alleged to be the offence was in truth done; and that every defendant in such action or information may traverse, that the offence was not committed in the county where such offence is alleged." Now, I do not see how in reason there can be any difference, with respect to this statutable provision, between acts of commission and acts of omission; and if not, I think it would be too much to catch at a strained interpretation of the words "done and committed," in order to put a doubtful construction upon the statute; more especially as it has been the general understanding, that in all actions on penal statutes, without any such distinction as now contended for, the venue must be laid in the proper county. It was at one time supposed that this rule was founded on the stat. 21 *Jac.* 1. *c.* 4.; but upon investigating that point in *Barber* v. *Tilson*, it was found to depend on the statute *Eliz.*, which was not repealed by that of king *James*, but is still in full force.

ABBOTT J. I am entirely of the same opinion. The stat. 31 *Eliz.* is a remedial law, designed to prevent abuses in the bringing of suits by common informers. Now, there cannot be a greater abuse than that the trial of an action should be drawn, at the pleasure of the informer, to a part of the county remote from that where the cause of action arises. The 7th section of the statute, including offences of omission as well as commission, removes, in my judgment, all doubt, if any can be said to have existed, upon the general scope and object of the act. That section provides, "That all suits

1816.

WHITEHEAD *against* WYNN.

suits to be pursued upon any statute for using any unlawful game," (which is an offence of commission,) "or for not using any lawful game, or for not having bows and arrows according to the law," (these are purely cases of omission,) "shall be prosecuted in sessions, or otherwise inquired of in the assizes, &c. where such offence shall be committed, and not in any wise out of the same county where such offence shall happen or be committed." It surely, therefore, cannot be argued after this, that the legislature intended offences of commission alone. (*a*)

Judgment reversed.

(*a*) See 3 *M. & S.* 465. *Rex* v. *Inhabitants of St. Mary, Taunton.*

POWELL and Another *against* GUDGEON.

Tuesday, November 19th.

Upon a policy of insurance on goods, where the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses: Held, that the underwriter was not answerable for this loss.

ASSUMPSIT on a policy of insurance at and from *Dominica* to *Bristol*, on sugars, rum, and coffee, marked and valued, on board the ship *Chard*.

The declaration stated, that on the 23d *July*, 1813, by the perils of the seas, the ship, with the goods on board, was damaged, and part of the goods was damaged and washed out of the ship; that part of the tackle of the ship was forced to be cut away and abandoned; and that for the safety, preservation, and recovery of the ship and cargo, and to enable her to proceed on her voyage, it was necessary to bring her to a place of safety to repair her, and to unload the cargo; and

that

1816.

POWELL *against* GUDGEON.

that the ship was accordingly brought to a place of safety, and was there kept and detained, and was repaired; and that the cargo was unloaded, and kept in proper places, and taken care of, and afterwards reloaded; and that on those occasions, and by means of the premises, expenses were incurred; and in order to defray the expenses necessary in that behalf, it was necessary to sell part of the cargo; and part of the plaintiffs' goods were sold accordingly, and were taken and carried away, and were lost to the plaintiffs, by reason whereof the defendant became liable to pay the plaintiffs a rateable part of the value of the goods sold, in proportion to the amount of his subscription; that a general average accrued, and the plaintiffs, as owners of the goods, were liable to contribute towards such general average; and that the defendant, as such assurer, became liable to pay to the plaintiffs a rateable proportion of the general average; that the plaintiffs were forced to labour and travel for, in, and about the defence, safeguard, and recovery of their goods; and that other expenses were thereby incurred by the plaintiffs; and that the defendant, as such assurer, was liable to pay to the plaintiffs a rateable proportion of the expenses.

Plea, non-assumpsit; and the defendant paid into court a sum sufficient to cover the partial loss of the goods by the perils of the sea, the proportion of the general average, and the expense of labouring and travelling for the safety and preservation of the cargo.

At the trial before Lord *Ellenborough* C. J, at the *London* sittings after *Michaelmas* term, 1815, there was a verdict for the plaintiffs, subject to the opinion of the Court, upon the following case.

The

The plaintiffs were merchants, and owners of the goods insured, which consisted of 153 hogsheads of sugar, 72 puncheons of rum, and 20 casks of coffee, and were loaded at *Dominica*. The loading was completed on the 22d of *July*, and the ship was about to sail on the 23d; but on that morning a violent hurricane drove her from her moorings at the island, and did material damage to the ship and cargo. Part of the tackle was obliged to be cut away and abandoned, and the ship was necessarily taken to the island of *St. Thomas*, where she arrived on the 27th of *July*. Both ship and cargo were so much damaged, that it was necessary to discharge her cargo; upon doing which, it was found that of 65 hogsheads, part of the sugar had been washed out, and the rest damaged. These 65 hogsheads were sold as damaged, and the loss arising upon them is covered by the money paid into court. The remainder of the goods were safely warehoused. The necessary repairs were done to the ship to enable her to proceed on her voyage; in order to defray the expenses of which repairs, the master of the ship, not having other funds in hand to defray them, and having no other means of raising money, sold part of the cargo, and amongst other goods, 52 hogsheads of sugar, 6 casks of coffee, and the 72 puncheons of rum, part of the goods belonging to the plaintiffs, and applied the proceeds to defray these expenses. The ship afterwards went to *St. Croix*, out of her course to *Bristol*, for the purpose of making good her freight, and did not finally sail on her return home until *November*, being warranted by the policy to sail on or before the 1st *August* preceding, and was captured in her voyage home, and condemned by the *French*.

And

1816.

POWELL
against
GUDGEON.

And the question was,

Whether the plaintiffs were entitled to recover beyond the sum paid into court, in respect of the loss accruing from the goods sold to defray the expenses of repairing the vessel. If the Court should be of that opinion, the verdict to be entered for a sum to be ascertained out of court; if otherwise, a nonsuit to be entered.

Littledale, for the plaintiffs, argued, that the defendant was liable to make good this loss; inasmuch as it was a loss resulting from a peril of the sea. The policy, he said, is against all losses which may arise by perils of the sea; if, therefore, the ship be disabled, through the force of the winds and waves, from pursuing her voyage, whereby she is compelled to take refuge in a foreign port and to repair, to what is this to be referred but to the perils of the sea? But if the master has occasion for money for the repairs of the ship, or other expense necessary to enable him to prosecute the voyage, and cannot otherwise obtain it, he may either hypothecate the whole cargo, or sell a part for this purpose. (*a*) And, according to *Emerigon*, (*b*), "If inability to navigate arises from want of money or credit, or other means to repair the ship, which was repairable in itself, one may, according to circumstances, consider this case as a peril of the sea, which has caused the ship to put in at a place where the captain is found without resources;" and he cites *Valin*, *art.* 46. *h. t.* p. 97. *Poth.* n. 120. Suppose the master in this case had neglected to sell any part

(*a*) *Gratitudine Mazzola*, 3 *Rob. Adm. R.* 240., cited in *Abbott on Shipping*, 153. 256.

(*b*) *Traité des Assurances*, ch. 12. s. 38.

of

1816.

POWELL against GUDGEON.

of the cargo, and, not having any other means of getting out of port, the ship had been detained there until the goods had perished, would not this have been a loss for which the insurer was liable? Then, if part of the goods were sacrificed to redeem the rest from such an event, he must also be liable. *Emerigon*, discoursing upon a sale like the present, concludes "that it is a peril of the sea for which the underwriters are liable." (*a*) There being no decision in our own law upon the point, it may be assimilated to the case of jettison.

Campbell, contrà, argued, that this was a new attempt to cast upon the underwriter on goods the responsibility of the ship-owner. It is plain, that if the master sell a part of the goods for the purpose of repairing the ship, the merchant will be entitled, if the ship reach her destination, to recover the value of these goods. (*b*) This money was raised by the sale of the goods for the repairs of the ship, the responsibility of keeping the ship in repair lying with the ship-owner, with which the owner of the goods has no concern. The indemnification for the loss arising from the sale of the goods is, therefore, a matter wholly between the ship-owner and the merchant, and forms no part of the insurer's undertaking. Besides, this is not a loss occasioned by a peril insured against, because that must be a peril acting upon the subject immediately, and not circuitously (*c*), as in the present case. The immediate cause of the sale of the goods was the want of other means to procure money for the repairs; if other means had been at hand, there

(*a*) 2 *Emer.* 445. to 448. tit. "*Of captain who, in course of voyage, sells cargo.*"

(*b*) *Alers* v. *Tobin*, cited in *Abbott on Shipping*, 256.

(*c*) *Hadkinson* v. *Robinson*, 3 *Bos. & Pul.* 388., per Ld. *Alvanley*.

1816.

POWELL *against* GUDGEON.

there would have been no loss in this respect, notwithstanding the perils of the sea. As to jettison, it has never been considered as rendering the insurer liable for the value of the goods thrown overboard, but only for a general average. Of this opinion is *Roccus*, in his treatise *De Asseccurationibus*, n. 62.; and his opinion is agreeable to the laws of all the trading powers on the Continent, as well as to those of *England* (a): and yet it is observable, that *jettison* is one of the perils named in the policy.

Lord ELLENBOROUGH C. J. *Emerigon*, whose name has been so frequently mentioned in the course of the argument, is entitled to all the respect which is due to a very learned writer discussing a subject with great ability, diligence, and learning, and adverting to all the authorities relating to it: but, still, his opinion, like the opinion of any other learned man, is fallible; and, in the present instance, it is founded on a great many ordinances which do not govern our decisions. Laying out of the case the opinions of foreign jurists, and all which does not properly bear on the point in question, I am inclined to think the damage in this case is to be considered as not arising immediately from a peril of the sea, although, in a remote sense, it may be said to have been brought about by a peril of the sea; but our rule of construction is, *causa proxima non remota spectetur.* The injury to the assured was caused by the sale of their goods; but no one will contend that the sale was an immediate consequence of a peril of the sea. The peril of the sea damaging the ship rendered it innavigable; to restore its navigability

(a) *Parke on Insurance*, 212. 7th edit.

a re-

a refitment became necessary. The captain, who was interested in and bound to have the ship in a navigable state, being unable to raise the means for refitting her, was obliged to apply to the owners of the goods for a loan, through the medium of a sale of part of the goods. It was therefore a sort of forced loan which was the proximate cause of loss to the owners from the sale of their goods. This was indeed connected with a peril of the sea, because a peril of the sea occasioned damage to the ship, which made repairs necessary, and funds to provide these repairs; but it was the want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods. In conformity, therefore, to the rule that the proximate cause, and not that which is remote, is to be looked to, I think the underwriter is not liable. Giving the largest construction to the general words "perils of the seas," I think this is not a case of immediate loss by perils of the seas. Without going into an inquiry how far this resembles the case of jettison, or of general average, the discussion of which might raise future doubts, I say that perils of the sea are too remote a cause of the present loss to make the underwriter liable.

BAYLEY J. I am entirely of the same opinion. It does not appear to me that this was a loss by a peril of the sea, or such as entitles the assured to recover, under the general words of the policy; but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the ship. The owner of the ship undertakes to have the ship fit to perform her voyage; and in case of accident, it is the duty of the owner, and the master in place of the owner, to provide

1816.

Powell *against* Gudgeon.

for its repair. I consider it as a rule applicable to the construction of policies, that the Court must look to the immediate cause of loss, in order to ascertain whether it be a loss within the policy. The loss here was occasioned by the act of the captain, who disposed of the goods, in order to provide himself with funds for the repair of the ship. If he could have raised these funds in any other way, he would not have taken the goods. To hold this a loss for which the underwriter is responsible, would be to make his liability depend upon the accident of the captain's being unable to provide funds for the repair, except by means of the goods. In the case of jettison the immediate cause of loss is a peril of the sea. When the whole is likely to be swallowed up by the sea, the law of jettison allows a part to be sacrificed to save the rest. Inasmuch, therefore, as we are bound, according to the common rule for the construction of policies, to look to the immediate cause of loss, and as this loss was not immediately caused by a peril of the sea, but by the inability of the captain to procure a fund for the repairs, which he was bound to do, it seems to me that this was not a loss within the policy.

Abbott J. I am also of opinion that the plaintiffs are not entitled to recover. Cases of this kind, where a sale of part of the cargo has been made under circumstances like the present, must, as I should think, have occurred frequently; and if by the law of *England* the underwriters had been considered as liable, we should probably have found some trace of it in the books, whereas this appears to be the first action in which an attempt has been made to charge the underwriter. I very much doubt, whether, in the true and legal

1816.

POWELL *against* GUDGEON.

legal sense of the word, these goods can be considered as lost to the owner; but it is not necessary to enter upon that inquiry, as I am satisfied, upon the grounds stated by my Lord and my Brother *Bayley*, that the cause of loss is too remote.

Judgment of nonsuit.

GRANT *against* The ROYAL EXCHANGE ASSURANCE Company.

Tuesday, November 19th.

Where damages are unliquidated and there is not a mutuality, there cannot be a set-off; therefore, where plaintiff declared in covenant for a total loss on a policy of assurance effected in his own name, and averred the interest in one count to be in himself, and in another in himself and others, to which defendants pleaded that a less sum was due on the policy than for a total loss, and set off monies due to them on plaintiff's bond, which was made to them before they had notice that any other than plaintiff was interested in the policy: Held, that these pleas were ill,

COVENANT. The plaintiff declares on a policy of assurance "at and from *London* to *Smyrna*, on the ship *Esther*, valued at 2000*l.*, and 3000*l.* on goods;" and avers, in the first count, that the interest in ship and goods was in himself; that the ship and great part of the goods on board, while proceeding on her voyage, were, by violence of the winds and waves, shattered, broken to pieces, damaged, wetted, injured, and spoiled; and the residue of the goods were, for the necessary preservation of the ship and the lives of the crew, thrown overboard and lost, whereby an action hath accrued to demand 5000*l.* In the second count, he avers, that the interest as to the ship was in himself, one *W. Llewellyn*, and one *F. G. Wilkinson*; and as to the cargo, in himself, the said *W. L.*, *F. G. W.*, and certain persons using the firm of *Wilkinson* and Sons, of *Smyrna*.

The defendants plead, that at the time of exhibiting the plaintiff's bill there was owing from defendants to the plaintiff, for damages on account of the breach assigned

1816.

GRANT *against* The ROYAL EXCHANGE Assurance Company.

signed in the first count, 230*l.* 18*s.* 4*d.*, and no more; and that before that time, to wit, on 9th *October*, 1811, the plaintiff became bound to them in an obligation, with a penalty of 2000*l.*, conditioned for the payment to them, by the said *W. Llewellyn*, of all premiums upon policies of insurance then made or to be made by him with them, either in his own name or the names of other persons; and that 656*l.* was due to them from the said *W. Llewellyn* for premiums on policies made in his own name, 750*l.* for other premiums on policies in the name of the plaintiff, and 594*l.* for others in the name of *Severn* and Co.; of which the plaintiff had notice, and was requested to pay, but refused; and that the whole penalty was due on the plaintiff's bond, which exceeded the aforesaid damages, and out of which the defendants were ready to set off the same. And they plead, in like manner, as to the breach assigned in the second count, and also aver, that the bond was executed before the defendants had notice that the policy of assurance was made for the use or benefit or on the account of any person except the plaintiff, or that any person except the plaintiff was interested in the ship and goods. Demurrer. Joinder.

Bosanquet Serjt., for the defendants, was called upon by the Court to maintain these pleas; and he argued, first, that the plaintiff's demand, though in the form of covenant, was in substance a debt, capable of being made the subject of set-off. He said that money due for a loss upon a policy of assurance, at least, if the policy be under seal, constitutes a debt, and an action of debt lies for it. If the loss be total, it is ascertained at once; and if partial only, it is nevertheless capable of being

being ascertained by averment, and may be recovered in debt as well as covenant. (*a*) Debt is a common form of action in cases like the present, and is recognised by stat. 6 *G.* 1. *c.* 18. *s.* 4. as one of the modes of suing the two chartered assurance companies. So by stat. 11 *G.* 1. *c.* 30. *s.* 43. they may plead *nil debent*, or *noninfreg. convention.*, according to the nature of the action by which they are sued. A loss upon a policy of assurance has been considered a debt capable of being proved under a commission of bankruptcy; and there being a doubt whether this could be done if the loss happened after the bankruptcy, the stat. 19 *G.* 2. *c.* 32. *s.* 2. removed this doubt, by enacting, that the assured shall be admitted to claim, and after the loss to prove his demand, in like manner as if the loss had happened before the issuing the commission. From all which it appears that the subject-matter of the plaintiff's demand is properly a debt; and, therefore, may be set off, although this be an action of covenant; in like manner as in covenant for non-payment of rent, a set-off is allowed. (*b*) Secondly, he argued that the debts proposed to be set against each other were mutual debts. The policy having been effected by the plaintiff in his own name, and not as agent for others, it must be taken as against him, that he is the principal; and the second plea avers, that the bond was executed to the defendants before they had notice that any other persons were interested in the policy. Admitting that other persons were interested, still the debt accruing on this policy is in law a debt due to the plaintiff, however he may be liable to account with others as a trustee. This

(*a*) *Saunders* v. *Mair*, 3 *Lev.* 429.

(*b*) *Bull. N. P.* 181. *Barnes*, 291. *S. C.* See *Oldenshaw* v. *Thompson*, ante, 164.

1816.

GRANT *against* The ROYAL EXCHANGE Assurance Company.

falls within the doctrine of *George* v. *Claggett* (a), and the authorities cited in that case.

Lord ELLENBOROUGH C. J. On neither of the grounds that have been taken in argument, as it appears to me, is this set-off maintainable. The plaintiff, in the first count of his declaration, claims the whole amount of the policy. The defendant, by his plea to this count, answers, that only a part of this sum is due; but what liquidation has there been of the loss? The question must go to a jury to ascertain the *quantum* of loss. The defendants assume to cut down the demand according to their own estimate of it. Why is the plaintiff to be obliged to abide by this liquidation? It seems to me, therefore, that this is a case of unliquidated damages. And, on the other point, as the policy embraces several interests, there is no mutuality between the policy and the obligation made to the defendants.

BAYLEY J. I quite agree that this is not a case of set-off. The plaintiff's claim is for unliquidated damages to the extent of 5000*l.* The defendants say that only 230*l.* are due; and as to that sum they plead a set-off. But what right have they to put the plaintiff to the alternative either to admit that only 230*l.* are due, and controvert the set-off, or, admitting the set-off, to deny that 230*l.* only are due? On this short ground, that the plaintiff ought not to be driven to this alternative in a case of unliquidated damages, I think these pleas cannot be sustained.

Per Curiam, Judgment for the plaintiff.

Chitty was to have argued in support of the demurrer.

(a) 7 *T. R.* 359. *Stracey, Ross, and Others*, v. *Deey*, 2 *Esp. N. P. C.* 269.

1816.

The KING *against* The Inhabitants of PENRYN.

Wednesday, November 20th.

A person occupying, at 4*l.* a-year, part of a dwelling-house of the annual value of 18*l.*, does not, since 35 *G.* 3. *c.* 101. *s.* 4., acquire a settlement, although he be rated, and pay to the church and poor-rate for the whole house.

UPON appeal, the court of quarter sessions for the county of *Cornwall* quashed an order of two justices for the removal of *Thomas Morris* and *Elizabeth* his wife, from the borough of *Penryn* to the parish of *Crantock*, in the said county, subject to the opinion of this Court, on the following case.

The pauper being legally settled in *Crantock*, went with his his wife, several years ago, to *Penryn*, and resided there, occupying four rooms, at the yearly rent and of the value of 4*l.*, part of a large dwelling-house, of the yearly value of 18*l.* and upwards. The other parts of the dwelling-house were occupied by several other tenants, two of whom also paid 4*l.* a-year each for their respective apartments. This dwelling-house had but one outer door and one staircase, and each tenant kept the key of his own apartment. For three years and upwards immediately preceding the date of the order of removal, the pauper was rated to the church and poor rates for the whole house, and paid the same; and they were allowed to him out of his rent, except in one instance. While he was thus rated, he occupied no other property than the four rooms, and had no concern with or controul over the remainder of the house; and during the whole time he was so rated, he resided in the said rooms.

Gaselee and *W. P. Taunton*, in support of the order of sessions, contended, that the pauper acquired a settlement,

1816.

The KING *against* The Inhabitants of PENRYN.

tlement, by having been charged and paid his share towards the public taxes of the parish. They said, that in construing the act 3 *W.* & *M. c.* 11. *s.* 6., it had been held sufficient, for the purpose of a settlement, if a man be rated and pay, although the rate be not strictly legal (*a*), or he be wrongfully assessed for premises which another occupies; for this amounts to notice on his part, and a recognition on the part of the parish, of the man's inhabitancy among them. (*b*) But if a rating and payment, without any occupation, is sufficient, surely he who occupies to the extent of 4*l. per annum* cannot be in a worse condition. With respect to the act 35 *Geo.* 3. *c.* 101. *s.* 4., though it has, in most instances, done away this head of settlement, by enacting, that "no person shall in future gain a settlement by being charged with and paying his share towards the public taxes of the parish for any tenement, not being of the yearly value of 10*l.*;" yet here, the tenement being above that yearly value, the settlement is not affected by this enactment.

Gurney, contrà, quoted the judgment of Lord *Kenyon*, in *Rex* v. *Islington* (*c*), who considered it to be clear, that the legislature meant that the operation of the act 35 *Geo.* 3. should be general; and that no person, after the passing of that act, should gain a settlement by being rated and paying. It was intended to make an end of this head of settlement law in future.

Lord ELLENBOROUGH C. J. It will be in vain for the legislature to make general enactments, if such enact-

(*a*) *Rex* v. *St. Giles, Cripplegate*, 19 *Vin. Ab.* 386.

(*b*) *Rex* v. *Stapleton, Burr. S. C.* 649.

(*c*) 1 *East*, 283.

ments

1816.

The KING *against* The Inhabitants of PENRYN.

ments are to be explained away, and their operation defeated by nice distinctions. The stat. 35 *Geo.* 3. *c.* 101. *s.* 3., in the first instance, prevents any person from gaining a settlement by delivery and publication of notice; in the next place, the statute prevents any person from gaining a settlement by being charged with and paying his share towards the parish taxes, in respect of any tenement not being of the yearly value of 10*l.* This enactment was undoubtedly meant to abrogate this head of settlement, and the authorities upon it, which, perhaps, had been carried to some degree of absurdity. Lord *Kenyon* appears so to have considered the operation of the act; and I am glad that we have his authority for it. If this construction of Lord *Kenyon* had not been felt to be the correct one, I doubt not that we should have had some observation upon it from the learned reporter, with whom the act originated, and which is generally known by his name.

ABBOTT J. I am of the same opinion. This act prevents the removal of any person before he is actually chargeable. This rendered it expedient to do away with settlements by notice, or paying rates for tenements of very small value.

Per Curiam, Order of sessions quashed.

1816.

Wednesday, November 20th.

DURNFORD *against* MESSITER.

An affidavit of debt for money lent, and for goods sold and delivered, and for work and labour, is irregular, if it omit to state that it was "at the instance and request of defendant," although it state that it was "to and for his use, and on his behalf."

THE defendant was held to bail on an affidavit made by the plaintiff, stating that the defendant was indebted in 20*l.*, for money advanced, laid out, expended, and paid; and for goods sold and delivered by the plaintiff, to and for the use of the defendant; and also for work, labour, and diligence; and for fees due and of right payable to the plaintiff, as an attorney, in respect thereof, for and on the behalf of the defendant: but the affidavit omitted to state that it was "at the special instance and request of the defendant;" and by reason of this omission, a rule nisi was obtained for discharging the defendant on common bail.

Marryat, who now shewed cause, contended that the omission was immaterial; for, as the affidavit stated that the money was advanced, and the goods sold "to and for the use of the defendant," and that the work was done "for and on his behalf," a request from the defendant was unnecessary; but, if necessary, must be implied. But,

Per Curiam. Money paid to and for the use of the defendant does not necessarily raise a cause of action; because a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor. So the goods may, consistently with this affidavit, have been sold and delivered to a third person for the defendant's use, without his being acquainted

1816.

DURNFORD *against* MESSITER.

acquainted with the transaction; and if so, he cannot be charged with them. An affidavit which is to operate in restraint of the liberty of a party, ought to use unequivocal language.

Barrow was in support of the rule.

Rule absolute. (*a*)

(*a*) See *contrà*, *Eyre* v. *Hulton*, 5 *Taunt*. 704. *Bliss* v. *Atkins*, ib. 756.

COLOGAN and Another *against* The Governor and Company of the LONDON Assurance.

Friday, November 22d.

Insurance at and from *Quebec* to *Teneriffe* on a cargo of wheat, fish, and staves, with the usual memorandum as to corn and fish free from average, unless general; and the ship was captured, and afterwards recaptured, and sent by the recaptors to *Bermuda*, where, a scarcity prevailing, an embargo was laid on the export of provisions, and the cargo being landed, it was found that 585 bushels of wheat were so damaged by sea-water, that they were, by order of the magistrates, for the sake of the public health, thrown overboard; and other part of the wheat being damaged, the captain sold that part and the fish, which sold at a profit; and put up the ship to sale, which he purchased at not more than one-fourth of its value, for the benefit of the owners; and having repaired her, and being refused permission to ship the remaining wheat to *Teneriffe*, he directed it to be sold, and purchased it for the benefit of those concerned; and by leave of the governor, the embargo being then raised as to the *West India* islands, shipped the same for *Madeira*, where he arrived, and delivered it; and took in a cargo of wine for *London*, with which he arrived: Held, that the assured, who had abandoned upon receiving intelligence of the circumstances which happened previously to the time of the ship's being permitted to proceed to *Madeira*, were entitled to recover as for a total loss on the whole of the goods insured.

IN covenant upon two policies of insurance under seal, effected by the plaintiffs for *Barnard Cologan*, a merchant at *Teneriffe*, the first for 1000*l*., the other for 200*l*. on 3224 bushels of wheat, 326 cwt. of fish, and 4284 pieces of staves, valued at 1270*l*., on board the *Friendship*, with the usual clause of warranty as to corn and fish, "free from average, except general," at and from *Quebec* to *Teneriffe*; the plaintiffs declared as for a total loss by capture, and by perils of the seas, and averred the interest to be in *B. Cologan*. The defendants

pleaded

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

pleaded *non infreg. convent.*, and paid 200*l.* into court. On the trial before Lord *Ellenborough*, at the *London* sittings after *Hilary* term, 1815, there was a verdict for 400*l.*, with liberty to the plaintiffs to move to enter a verdict as for a total loss. and to the defendants to move for a nonsuit; which motions having been afterwards made, the following case was stated:

In *September*, 1812, the *Friendship* took on board, at *Quebec*, the wheat, fish, and staves, mentioned in the declaration, consigned to *B. Cologan* at *Teneriffe;* and, on the 5th *October*, sailed from the river *St. Lawrence*, under convoy. A few days afterwards a heavy gale of wind dispersed the fleet, and she lost the convoy, and proceeded for *Teneriffe* until the 22d *October*, when she was captured by an *American* privateer. The privateer plundered her of most of her stores, took out all her crew, except the captain and a boy, put a prize-master and ten men on board, and ordered her to *Portsmouth* in *New Hampshire*. On the 6th *November*, whilst proceeding thither, she was recaptured by the *Shannon* and several other of His Majesty's ships of war. The recaptors, being very much in want of hands, were at first about to set her on fire, but finally resolved to send her to *Bermuda*, there being a scarcity of provisions there at that time. They, accordingly, took seven men from the different king's ships to navigate her. These were inexperienced seamen, and formed a very inadequate crew; and the captain was often obliged to go aloft, and to assist in handing the sails. On her passage to *Bermuda* the ship made a great deal of water, and at one time it was necessary to keep both her pumps going. There were several times four feet water in her hold, and it was found necessary to throw 471 of the staves overboard.

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

overboard. On the 29th *November* she arrived at *Bermuda*, at that time making more than twelve inches water an hour. The captain immediately petitioned the Vice-Admiralty Court for leave to land the cargo, on account of the leaky state of the ship. Leave was granted, on finding bail for the salvage; which bail was accordingly given, and the cargo taken out. The ship, on the 15*th December*, was examined, and reported to require some repairs, but to be worth repairing. Five hundred and eighty-five bushels of the wheat were found to be in such a state, from the sea-water, that the magistrates, out of regard to the public health, ordered it to be destroyed. It was wholly unfit for use, and was, accordingly, carried outside the harbour and thrown into the sea. The rest of the cargo was landed and warehoused, and part of the remaining wheat was damaged. When the ship arrived at *Bermuda*, the settlement was much distressed for provisions, and a general embargo existed, prohibiting the exportation of them to any place whatsoever. The captain caused the ship, the remaining staves, the fish, and that part of the wheat which was damaged, to be put up to sale, in order to ascertain the salvage, keeping back the sound wheat, in expectation that the embargo might be raised. The fish was sold to a profit. The captain purchased the ship on account of and for the benefit of the owners and those that might be concerned, at the price of 200*l.*, which was not more than one-fourth of her value. He then caused her to be repaired; but the repairs were not completed before the 10th or 12th *February*. The embargo was raised, as far as respected his majesty's *West India* islands, on the 3d *January*; but, as to all other places, continued in force until after the

Friendship

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

Friendship sailed from *Bermuda*. She was released by the Vice-Admiralty Court about the 15th of *January*, the salvage having been settled. The captain went to the governor to request permission to ship the undamaged wheat, amounting to 2103 bushels, for *Teneriffe*; which being refused, he directed it to be sold, and purchased it for the owners and those who might be concerned. This took place about the 22d *January*; and one of the navy contractors having offered the captain to ship flour on board the *Friendship* for *Madeira*, if the governor's consent could be obtained, the captain agreed to this proposal, provided his wheat were included. Leave was accordingly obtained, as *Madeira* was then garrisoned with *English* troops; and the captain took the flour and wheat on board, and sailed for *Madeira*, where he arrived and delivered his cargo in *May*. He there took in a cargo of wine, with which he sailed and arrived in *England* on the 13th of *June*. On the 2d of *January* the captain wrote from *Bermuda* to his owners in *London* the following letter:

"I am sorry to inform you, that on 22d *October* last, in lat. 40. N. long. 35. I was captured by an *American* privateer, of 18 guns and 100 men; they had possession until the 6th *November*, when we were recaptured by his majesty's ships *Shannon*, *Nymph*, *Tenedos*, and *Curlew*, and sent in here. We got in on the 29th, the ship making a great deal of water, and the sails and rigging in a bad condition. The cargo was discharged by an order from the Admiralty Court. The ship made fifteen inches of water per hour. There were near 600 bushels of the wheat damaged, which were hove overboard. The magistracy would not suffer it to be landed. There being an embargo on all provisions, and the voyage totally defeated,

feated, I abandoned, and have sold both ship and cargo. The ship, not going for more than one-fourth of the value, I have bought her in for the interest of all concerned. The wheat, about 700 bushels, sold under its first cost. I thought proper to stop the sale of that, and have petitioned the governor to allow me to reship it for *London*. The other part of the cargo sold for something more than first cost. I would have transmitted you an account of sales; but the wheat still remaining on hand, and not knowing whether I shall have liberty to ship it, I have inclosed a copy of protest and survey, and shall, before I leave this, send home other necessary documents and vouchers. I intend to advertise the ship for *London*, to sail with the first convoy, and to take whatever freight may offer, not doubting but I shall get a full ship home."

This letter, upon its receipt in *London*, was communicated to the agents of *B. Cologan*, who gave the defendants a regular notice of abandonment. The money paid into court was sufficient to cover the salvage, and the general average arising from the foregoing circumstances.

The questions were, whether the plaintiffs were entitled as for a total loss on the whole of the goods insured, or on the 585 bushels of wheat thrown into the sea.

Campbell, for the plaintiffs, submitted, first, that here was a total loss of the whole cargo insured; for this was not like those cases (*a*) where the voyage was merely interrupted or retarded, but here was a complete destruction of the adventure. It was a total loss, commencing in

(*a*) *Anderson* v. *Wallis*, ante, vol. ii. 240. *Falkner* v. *Ritchie*, ib. 290.

capture,

1816.

COLOGAN against LONDON Assurance Company.

capture, and continuing unchanged by any of the subsequent events. Although recaptured, the ship was not set free, nor allowed to pursue her course; on the contrary, she was compelled to seek a port, where, by reason of an embargo, she was prohibited from ever afterwards completing her destination; for the embargo still prevailed as to *Teneriffe*, when the ship left *Bermuda*. Recapture may, in some instances (*a*) alter the nature of the loss from a total into a partial one; but in others, notwithstanding a recapture, and though some material part of the cargo remain, the loss will still be total, if the disability to pursue the voyage be complete; and then the assured may abandon what is saved. (*b*) And it seems, from the foreign jurists (*c*), as well as from our own decisions (*d*), that embargo alone is a sufficient ground for abandonment. Secondly, he insisted, that the plaintiffs were, at all events, entitled to recover for the 585 bushels of wheat thrown overboard. To this extent the commodity was totally lost to the assured, in consequence of a peril insured against, for it was the sea-water which eventually produced the destruction of this portion of the cargo; and, therefore, this falls within the authority of *Dyson* v. *Rowcroft* (*e*), and *Davy* v. *Milford* (*f*), which authorities have much weakened that of *Cocking* v. *Fraser*. (*g*)

Richardson, contrà, argued, that if it should appear that there was not a total loss at the time of action (*h*)

(*a*) *Bainbridge* v. *Neilson*, 10 *East*, 329. *Parsons* v. *Scott*, 2 *Taunt*. 363.

(*b*) *Goss* v. *Withers*, 2 *Burr*. 683. *Milles* v. *Fletcher*, *Dougl*. 219. *M'Iver* v. *Henderson*, ante, vol. iv. 576.

(*c*) 1 *Emerig*. 541. 2 *Valin*. 134. *Roccus de Assecur*. not. 54. & 65. *Poth. Assur*. No. 59. *Malyne*, 110. (*d*) *Rotch* v. *Edie*, 6 *T. R.* 413.

(*e*) 3 *B. & P.* 474. (*f*) 15 *East*, 559.

(*g*) *Park*, 181, 7th edit. (*h*) *Brotherston* v. *Barber*, ante, p. 419.

brought,

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

brought, and *à fortiori* at the time of abandonment, the plaintiffs were not entitled to recover; and he said, that it would be strange, if, in this case, where the insurers had provided against any responsibility for partial loss, and where the loss upon one of the articles insured was little more than a tenth, upon another was under a fifth, and upon the third there was no loss at all, the article having sold to a profit, the insurers should nevertheless be held liable. The great bulk of the commodities insured subsisted in specie, in the hands, and at the controul, and had been disposed of by the master for the benefit of the plaintiffs, at the time when they gave notice of abandonment. Although the embargo remained in force, as to *Teneriffe*, the master might have gone elsewhere, or might have awaited its removal; but he made his election on the part of the plaintiffs, to sell. How then can it be competent to the plaintiffs to convert a partial into a total loss by abandonment? Embargo may be, under circumstances, as in *Rotch* v. *Edie*, where the ship was detained nearly three years, a lawful ground of abandonment; but it is not necessarily so. Unless, therefore, the disappointment in obtaining a market at *Teneriffe* constituted a total loss, there was nothing to warrant an abandonment. In *M'Iver* v. *Henderson* (*a*) the ship, under the restraints imposed upon her, was considered as *quasi* in the hands of the captors, and, therefore, it might well be considered a total loss. Secondly, he said, that where the commodity remains in specie, though rendered of no value by a peril insured against, according to *Cocking* v. *Fraser*, a total loss cannot attach; and this law was probably derived from the foreign

(*a*) *Ante*, vol. iv. 576.

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

jurists, because, in such a case, they hold that freight would be due. In *Dyson* v. *Rowcroft*, not only the whole cargo was thrown overboard, but the ship was unable to proceed on the voyage. This differs from both those cases; because here, the bulk remains, but a part is thrown overboard. And is not this rather a partial loss of the whole than a total loss of a part? If not, however minute the portion extinguished, the underwriter will be liable, although he has excepted all partial loss. In *Davy* v. *Milford* the loss was from an immediate peril of the sea, and not as here, only a consequence of it.

Lord ELLENBOROUGH C. J. This seems to me to be a case of total loss, and on this ground, that, by the capture, a total loss occurred in the first instance; and while the assured had no reason to believe that events had changed the nature of this loss, they abandoned. The case states that they gave a regular notice of abandonment, by which we must understand, complete in its form, to give it due effect as an abandonment. Now, where there has been a total loss and an abandonment, we must look to the situation of things before action brought, in order to ascertain whether the assured has since been restored to his rights, so as to do away the effect of the abandonment. In the present case, certainly, there has not been any restitution, considering it with reference to the main purpose of prosecuting the voyage insured. By an embargo at *Bermuda*, a prohibition was interposed to forwarding the cargo to *Teneriffe*; this, of course, defeated the voyage. I cannot, therefore, say, that what was a total loss at the time of abandonment ever became otherwise, from that

time

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

time to the time when the action was brought; on the contrary, it appears to be a continuing total loss, unredeemed by subsequent events. It is said, that if the plaintiffs recover, a partial loss will attach on the insurer, contrary to the agreement and intention of the parties; but this objection is answered, if the loss be entire by the capture, and nothing has happened since to redeem it. On this principle, the case of *M'Iver* v. *Henderson*, and other cases, determined that the assured had a right to abandon. As to the other point, if it were material, I should incline to the opinion of Lord *Alvanley*, in *Dyson* v. *Rowcroft*, in preference to that of Lord *Mansfield*, in *Cocking* v. *Fraser*. Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in specie, if it subsist only in the form of a nuisance. There is a total loss of the thing, if, by any of the perils insured against, it is rendered of no use whatever, although it may not be entirely annihilated. But it is not necessary to go further into this, the great question being, whether this is a total loss, unredeemed by subsequent events; upon which I have already stated my opinion.

BAYLEY J. It appears to me, that, according to the facts stated in this case, the plaintiffs were warranted in making abandonment, and that nothing which afterwards happened has deprived them of the right to insist on this abandonment. At one period, doubtless there was a total loss, by the capture of the ship; circumstances might have intervened which would have changed this loss from a total into a partial loss. The object of the policy is, to insure the risk against failure, by reason

 of

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

of any of the perils mentioned in the policy; that is, in the present instance, that the cargo should reach the port of destination. The destination is to *Teneriffe*; the ship, with the cargo, in her course thither, is captured; recapture follows, but not so as to enable the ship to proceed to *Teneriffe*; for she is sent to *Bermuda*, where she is placed under an embargo, from which she is never released, except upon condition of altering her destination to *Madeira*. Therefore there has been no restitution of any part of cargo, as it regards the risk insured to *Teneriffe*. If this be so, it follows, that the ship and cargo never were effectually redeemed from capture; and the plaintiffs are entitled to recover as for a total loss.

ABBOTT J. Capture operates as a total loss, unless it be redeemed by subsequent events. Here no such events have occurred as to restore the goods to the plaintiffs, and place them under their free controul. I do not consider an abandonment as having the effect of converting a partial into a total loss; but here the loss was total in the first instance, and continued so ever after. The abandonment, however, excludes any presumption which might have arisen from the silence of the assured, that they still meant to adhere to the adventure as their own. It is not necessary to offer any opinion on the second point; if it were, I should strongly incline to the conclusion, that this was a total loss of part.

HOLROYD J. I am of the same opinion. This was a total loss by capture, and has never ceased to be so. What was done here was entirely the act of the re-

captors;

1816.

COLOGAN *against* LONDON ASSURANCE COMPANY.

captors; who, instead of forwarding the ship to her port of destination, sent her to *Bermuda*, and neither the ship-owner nor owner of the goods ever had possession of her again. Therefore, as it seems to me, the loss continued to be a total loss by capture, as it was in its commencement. On the other point, the inclination of my opinion is, that after part of the whole cargo was thrown overboard, there was a total loss by perils of the seas of that part.

Judgment for the plaintiffs for a total loss.

The KING *against* The Justices of WORCESTERSHIRE.

Friday, November 22d.

An appeal against overseers' accounts must be to the next general quarter sessions after the allowance of the accounts. The 17 *G.* 2. *c.* 38. *s.* 4. is, in this respect, a repeal of the 43 *Eliz. c.* 2. *s.* 6.

THE overseers' accounts for the parish of *Elmley Lovett* for the years 1814 and 1815 were allowed by two justices, on the 31st *March*, 1815. Notice of appeal against the same was given for the sessions to be holden on the 23d *April*, 1816, at which sessions an appeal was entered; but the Court refused to enter upon the merits, or to hear the appeal, on the ground that it came too late. And the question was, whether the appeal ought to have been to the general quarter sessions next after the allowance of the accounts. A rule nisi having been obtained for a mandamus to the justices to receive the appeal,

Shutt, who shewed cause, contended, that the 17 *G.* 2. *c.* 38. *s.* 4., which required that the appeal should be made to the next sessions, was a virtual repeal of the 43 *Eliz. c.* 2. *s.* 6., which gave an appeal generally. And

1816.

The King against The Justices of Worcester.

he said, that although regularly an affirmative statute shall not repeal a precedent affirmative law, yet it is otherwise if the subsequent statute contain matter contrary to the former. (a) As, if a former act says, that a juror upon such a trial shall have 20*l.* a-year, and a new statute enacts that he shall have 20 marks; here the latter statute, though it doth not express, yet it necessarily implies, a negative, and virtually repeals the former. (b) So, though the 43 *Eliz.* has imposed no limitation as to the time of appealing, yet the 17 *G.* 2. enacts, that the appeal shall be to the next general or quarter sessions. This latter act, therefore, hath abrogated the former, because they are contrary in matter. And, therefore, it has been adjudged that an appeal against a poor-rate must, in all cases, be to the next sessions. (c) It would be a strange construction, then, of these acts, if the very same words in the same two clauses were to bear a different sense with respect to overseers' accounts from that which has been given to them with respect to poor-rates. The case of *Rex* v. *Earl of Ashburnham* (d) is the only authority for such a construction, but that has never yet been recognised.

Peake and *Puller*, contrà, relied principally upon *Rex* v. *Lord Ashburnham*, giving as a reason why its authority could not have been recognised, that it had but lately appeared in print. And they said, that *Rex* v. *Coode* regarded only appeals against a poor-rate; whereas the

(a) Dr. *Foster's* case, 11 *Rep.* 63. *a.* (b) *Jenk. Cent.* 2. 73.

(c) *Rex* v. *Coode*, *Cald.* 464. 1 *Bott.* 276. *S. C.* *Rex* v. *Micklefield*, *Cald.* 507. 1 *Bott.* 279. *S. C.* *Rex* v. *Atkins*, 4 *T. R.* 12. *Rex* v. *Justices of London*, 15 *East*, 632. (d) 2 *Nolan's P. L.* 360. in not.

1816.

The KING *against* The Justices of WORCESTER-SHIRE.

the other was an express decision upon the point; and in *Rex* v. *Justices of Dorsetshire* (a) the court considered it as by no means settled, that the 17 G. 2. had, in this respect, repealed the 43 *Eliz.* Although it may be difficult to make a distinction between the two cases, yet it may be observed, that to limit an appeal to the next sessions against overseers' accounts, where, perhaps, the matters of account are voluminous and complicated, might be productive of great inconvenience; for it might be impossible, within so short a period, to unravel the account and detect fraud.

Lord ELLENBOROUGH C. J. In *Rex* v. *Coode*, the case of *Rex* v. *Lord Ashburnham* was brought under the consideration of the court, and yet they came to a decision directly contrary to it; and where good sense and convenience are all on one side, one is almost led to regret that Serjt. *Kerby*'s note of that case ever got into print. The plain meaning of the 17 G. 2., in enacting, "That it shall be lawful to appeal to the *next* sessions," where, by a preexisting act, the appeal was without limitation of time, is to negative the power of appealing to any but the *next*. In *Rex* v. *Coode*, Lord *Mansfield* was of opinion that the 17 G. 2. did confine the appeal, and the court agreed that they must decide that the statute had repealed the 43 *Eliz.* in this particular. I feel no inclination to disturb that decision, considering how much the public convenience is in its favour. I know not to what difficulties persons whose property is liable, and those who are bound to account, might be reduced, if we were to adopt a different con-

(a) 15 *East*, 200.

1816.

The King *against* The Justices of Worcestershire.

struction. With respect to the objection, that the time may be too short to prepare for the appeal, if, upon any occasion, this should be made appear, the appeal may be lodged, and adjourned on a proper application.

Bayley J. I am of the same opinion. I think that the affirmative words of the 17 *G.* 2. must be taken to imply a negative. If the statute had been silent as to the time of appeal, the 43 *Eliz.* would have attached; and it would have been open to the party to appeal at any time. But as the statute empowers the party to appeal to the next sessions, I think it virtually implies that he must appeal to those sessions, and to no other.

Abbott J. I agree that this rule must be discharged. The construction put on these statutes by my Lord and my brother *Bayley* appears to be the true construction, conformably to the rule for the construction of acts of parliament so well laid down in the old cases, and adopted in *Rex* v. *Coode.*

Rule discharged. (*a*)

(*a*) *Holroyd* J. had left the court.

CULLEN *against* BUTLER.

Saturday, November 23d.

On a policy of insurance on goods in the common form, where the ship and goods were sunk at sea by another ship's firing upon her, mistaking her for an enemy: Held, that the insured was entitled to recover upon a special count, stating the particular circumstances; for this was within the general words of the policy, "all other perils, losses," &c. *Semble*, that such a loss is not a peril of the sea.

ASSUMPSIT on a policy of insurance for 200*l.*, upon goods on board the ship *Industry*, at and from *London* to the *Canary Islands*, the interest being averred in the plaintiff. The plaintiff declared in the first count, upon a loss by the perils and misfortunes of the seas; and in the second count, he averred, that the ship, with the goods on board, departed and set sail from *London* in prosecution of her intended voyage, and before her arrival at the *Canary Islands*, to wit, on the 7th of *July*, &c. in the night of that day, the master and crew of a certain *British* ship called the *Midas*, believing the ship in the policy mentioned to be an enemy's ship, and that the persons on board thereof were then and there in a hostile manner about to attack the *Midas* and attempt to board and take her as prize, did then and there, for the purpose of defending themselves and the *Midas* against such apprehended attack, but without any fault committed or done by the master or crew of the ship in the policy mentioned, fire at and against, and strike and pierce with shot the ship in the policy mentioned, whereby the said ship, with the goods on board, was sunk in the sea and lost. Plea, *non-assumpsit.*

At the trial before Lord *Ellenborough* C. J., at the *London* sittings after last *Hilary* term, the jury found that the ship and cargo were lost in the manner, and under the circumstances stated in the second count. And they found a general verdict for the whole sub-

scription,

1816.

CULLEN *against* BUTLER.

scription, subject to the opinion of the Court upon a case stating the above facts. And the question was, whether this was a loss covered by the policy, under the words, "perils of the seas," or under the general words, "all other perils, losses," &c. The case was argued at *Serjeant's Inn* before this term, by *Parke* for the plaintiff, and *Barnewall* for the defendant.

For the plaintiff, in support of the first count, were cited *Pickering* v. *Barkley* (*a*), *Buller* v. *Fisher* (*b*), and *Barton* v. *Wolliford* (*c*), from which it was deduced, that this loss was properly to be accounted a peril of the sea. And as to the second count, it was said, that it is not necessary to aver the loss in the very words of the policy, but if the fact alleged come within the meaning of the words of the policy, it is sufficient; and therefore, *per fraudem et negligentiam magistri* is good, without using the word "barratry." (*d*) And the general words in the policy ought to be construed to extend to losses of the like nature as those mentioned before, according to the rule *noscitur a sociis*. Collision, according to *Emerigon*, is a loss of this nature (*e*); and according to the *Ordonnance de la Marine*, art. 6., the risk of the assurer extends to "toutes pertes et dommages qui arriveront sur mer par tempêtes, naufrages, echouemens, abordages, changemens de route, de voyage ou de vaisseau, jet, feu, prises, pillages, arrêt de Prince, declaration de guerre, represailles, *et generalement toutes autres fortunes de mer*;" upon which latter words

(*a*) 2 *Roll. Abr.* 248. *pl.* 10. *Style*, 132. *S. C.*

(*b*) *Abbott on Shipping*, 266. 4th ed.

(*c*) *Comberb.* 56.

(*d*) *Knight* v. *Cambridge*, 2 *Ld. Raym.* 1349. *Str.* 581. *S. C.*

(*e*) See *Smith* v. *Scott*, 4 *Taunt.* 126.

the

1816.

CULLEN *against* BUTLER.

the commentator observes, "Divers auteurs ont prétendu que les assureurs ne sont pas tenus, des cas, tout-à-fait extraordinaires, à moins que la police ne soit generale pour tous les cas, exprimés et non exprimés. Mais cette exception, qui ne pourroit que donner matière à des discussions frequentes, n'est pas admissible, parmi nous, à la vue de notre article, qui comprend absolument toutes fortunes de mer, s'il n'y a quelque restriction par une convention expresse." Also, according to *Emerigon* (*a*), "Abordage" is of three kinds: "1. par cas fortuit; 2. par la faute des gens de l'un des navires; 3. sans qu'on sache par la faute de qui 'c'est une fortune de mer;'" and further (*b*), "on entend 'par fortune de mer,' toutes les pertes, et toutes les dommages, qui arrivent sur mer par cas fortuit." And he concludes (*c*), "Mais l'opinion commune est, que les assureurs répondent de tous les accidens, quelque insolites, inconnus, ou extraordinaires qu'ils soient."

On the other side, it was argued, as to the first count, that by "perils of the sea," must be understood perils arising *from* the sea, or sea damage, and not such as are merely perils *on* the sea; neither can it be said to be a peril of the sea where the loss is occasioned, as it was here, by the fault of one of the parties. (*d*) And as to the second count, it was said that it had not been the practice in this country, whatever might be the opinion of foreign jurists, to extend the general words of the policy beyond the risks enumerated in it; and the cases of *Hadkinson* v. *Robinson* (*e*), *Rhol* v. *Parr* (*f*), *Lubbock* v. *Rowcroft* (*g*),

(*a*) Ch. 12. s. 14. (*b*) Ch 12. p. 359.
(*c*) Ch. 12. p. 360. (*d*) *Abbott on Shipping*, 268. *Buller* v. *Fisher*.
(*e*) 3 *B. & P.* 388. (*f*) 1 *Esp. N. P. C.* 441.
(*g*) 5 *Esp. N. P. C.* 50.

Hunter

1816.

CULLEN *against* BUTLER.

Hunter v. *Potts* (a), and 1 *Marsh. on Insurance*, 218. 2d edition, were cited.

In the course of the argument, the Court intimated the inclination of their opinion to be, that this was not properly a loss by "perils of the sea;" and they took time to consider their judgment.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

As the Court is of opinion, that the plaintiff is entitled to recover upon the second count of this declaration, framed upon the special circumstances of this case, which clearly seem to fall within the general and comprehensive words in the policy subjoined to the particular causes of loss therein specified, viz. "all other perils, losses, and misfortunes, which had or should come to the hurt, detriment, and damage of the said goods and merchandizes, and ship, &c. or any part thereof," it becomes less material to consider whether the plaintiff would be entitled to recover as for a loss "by perils of the sea," in the proper and strict sense of the words, i. e. "ex marinæ tempestatis discrimine," as described by *Emerigon*; which loss by perils of the sea is the specific loss stated in the first count. If it be a loss by perils of the sea, merely because it is a loss happening upon the sea, as has been contended, all the other causes of loss specified in the policy are, upon that ground, equally entitled so to be considered; and it would be unnecessary as to them ever to assign any other cause of loss, than a loss by perils of the sea. But as that has not been the understanding and practice on

(a) 4 *Campb. N. P. C.* 203.

the

1816.

CULLEN *against* BUTLER.

the subject hitherto, and inasmuch as the very insertion of the general or sweeping words, as they are called, in the policy after the special words, imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added, in order to extend the responsibility of the underwriters unequivocally to other risks not included within the proper scope of any of those enumerated perils, I shall think it necessary only to advert shortly to some of the reasons upon which we think that the general words, thus inserted, comprehend a loss of this nature. The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes. *Emerigon*, in *c.* 12. *s.* 1. *p.* 360. of his *Treatise on Insurances*, in discussing the general rule, that assurers answer for all loss and damages that happen on the sea, says, that it is to prevent doubts and vain disputes, that, in the printed formulas (of policies) the following words have been inserted; and then he instances the general words to be found in the formulas of most of the principal commercial ports on the *Continent*: "*All inconveniences, perils, and cas fortuits,* (which

1816.

CULLEN *against* BUTLER.

(which may be translated as misfortunes, accidents, &c.) *which may happen*;" and generally of "*all perils and fortunes which may happen in what manner soever, and which can be imagined*," is the provision to be found in the formulas of *Bourdeaux* and *Antwerp*. Generally of "*all perils, fortunes, or accidents which may happen, in what manner soever, forseen or unforeseen*," is the formula of *Nantes*. And that of *Rouen* and *Genoa*, "*generally of all inconveniences, foreseen or unforeseen*." The formula of *Hamburgh* is of all "*Cogitatis vel imaginatis, usitatis vel inusitatis, nullis exceptis*." But although there be an express exclusion of any exception by the terms of the last-mentioned policy, the reason of the thing ingrafts an implied exception, even upon these words, general as they are, that is, in the case of damage occasioned by the fault of the *assured*; as to which the rule is, "*Si casus evenerit culpâ assecurati, non tenentur assecuratores*." And *Emerigon* (*s.* 2. *p.* 364.) says, "This is a general rule, from which it is not allowed to derogate by a pact to the contrary;" "*Nullà pactione effici potest ut dolus prœstetur*;" and he quotes *Pothier*, where he says, "I cannot *effectually* (*valablement*) contract with any one that he shall charge himself with the faults which I shall commit." But this is a case in which the assured is, by the terms of the declaration and finding thereupon, expressly exempted from the imputation of blame in respect to the loss in question. It is no objection to the plaintiff's right to recover against the underwriters in this case, that he may have also a right to recover against the persons by whose immediate act the damage was occasioned. That has been decided in the case of a damage at sea by collision. The only inconvenience which can be suggested as likely to arise from a limited

construction

construction of the words *perils of the seas*, occurring in policies of assurance, and from the effect attributed to the general words, is, that in doubtful cases the plaintiff will feel it necessary to introduce a special count, stating the particular circumstances by which the loss was occasioned, instead of relying upon a count framed upon the special head of loss in the policy, viz. by *perils of the seas, or the like.* But this inconvenience will be well compensated to the assured, by the advantage of certainty, by which the risk of nonsuit at the trial, and the expenses attendant thereupon, will be avoided.

1816.

CULLEN *against* BUTLER.

Judgment for the plaintiff. (*a*)

(*a*) See *Butler* v. *Wildman*, 3 *B.* & *A.* 398.

DOE on the Demise of the Earl of JERSEY and Others *against* ~

Saturday, November 23d.

EJECTMENT for a messuage and lands in *Glamorganshire*. Upon a special verdict the case was this: *Bussy*, Lord *Mansel*, Baron *Mansel*, of *Margam*, in the county of *Glamorgan*, deceased, being seised in fee of divers manors, lands, &c. in the counties of *Brecon* and *Glamorgan*, comprising (among others) the premises in question,

Under a power given by a marriage settlement to tenant for life, to lease for years, determinable on three lives, reserving the ancient and accustomed rents, duties, &c. so as "there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved," a lease for 99 years, determinable on three lives, with a proviso for re-entry, "if the rent should be behind or unpaid in part or in all by the space of fifteen days next after the day of payment, and no sufficient distress could be had on the premises," was held to be a valid execution of the power; and that evidence, that the usual form of leases of the estate in settlement for years, determinable on three lives, as well prior to as after the settlement, was with a similar conditional proviso for re entry, was admissible evidence, the tenant for life having under the power a discretion as to the terms of the proviso, which the power required *generally* to be inserted in such lease.

1816.

Doe dem. Earl of Jersey against Smith.

question, by his will of 11th *December*, 1749, devised the same to his daughter, *Louisa Barbara*, for life, with divers remainders over; with power to his said daughter, in consideration of marriage, to revoke all the uses and devises concerning the premises, and to appoint the same and the fee-simple thereof to other uses, as she afterwards did by the deed of settlement after mentioned. Lord *Mansel* died on the 29th *November*, 1750, leaving his said daughter his only child and heir at law; who afterwards, on the 2d of *July*, 1757, by deed of that date, in consideration of an intended marriage between herself and *George Venables Vernon* the younger, afterwards Lord *Vernon*, revoked the uses contained in the said will, and appointed the lands, &c. devised to trustees in fee, to the same uses until the marriage; and afterwards to the use of the said *G. V. Vernon* for life, without impeachment of waste; remainder to herself for life, without impeachment of waste; remainder to the said trustees in trust, to support contingent remainders during their lives; remainder to divers other uses for the benefit of their issue, and of the issue of the said *Louisa Barbara*; and in default thereof, to such uses as she should by will appoint, &c. And it was provided by the deed as follows, "Provided always, that it shall be lawful for the said *G. V. Vernon*, and *L. B. Mansel*, his intended wife, from time to time during their respective lives, when and as they shall respectively be in possession of, or entitled to, the perception of the rents and profits, by indenture under their respective hands and seals attested by two or more credible witnesses, to demise, lease, or grant such parts of the said manors, lands, &c. as now are leased for life or lives, or for years determinable on life or lives, to any person in possession or

1816.

Doe dem. Earl of Jersey *against* Smith.

or reversion for one, two, or three lives; or for any number of years determinable on one, two, or three lives, so as there be not on any part of the same premises a greater estate at any one time than what will be determinable on three lives, and so as on every such lease for life or lives, or for years determinable on a life or lives, there be reserved during the continuance thereof the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, as now are, or at the time of demising the premises were reserved for or in respect of the same premises respectively, or a just proportion of such ancient or then present reserved rents, duties, and services, or more, according to the value of the premises so to be leased, (except heriots which shall or may be varied or compounded for according to the will of the said *G. V. Vernon* and *L. B. Mansel*): all such rents, duties, and services to be incident to, and go along with the reversion and remainder of the premises expectant on the determination of the leases, *and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;* and so as the respective lessees be not by any express clause freed from impeachment of waste; and so as the said respective lessees do seal and deliver a counterpart; and also by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, or grant any of the said manors, &c. and parts and shares of manors, &c. for any term of years absolute not exceeding 21 years, to take effect in possession and not in reversion, or by way of future interest, so as upon every such lease there be reserved during the continuance thereof so much or as great and bene-

1816.

Doe dem. Earl of Jersey against Smith.

ficial yearly and other rent and rents, and other services proportionably as now are paid, or the best and most improved yearly rent, without taking any fine, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder expectant on the determination of the said respective leases; and so as the respective lessees be not by any express clause freed from impeachment of waste; and so as the said respective lessees do seal and deliver a counterpart; and so as in every such lease there be contained a clause of re-entry, in case the rent should be unpaid by the space of 28 days after the times appointed for payment thereof; and also by indenture under their respective hands and seals, attested as aforesaid, to demise, lease, and grant all or any part of the lands, hereditaments, and premises, whereupon any mine now is open, or whereon any person shall be willing to open any mine or sough, or other thing which may be necessary for the digging and getting of lead or copper ore, or any metal or mineral whatsoever, unto any person for any term of years not exceeding 31, to take effect in possession and not in reversion, or by way of future interest; and so as upon every such lease there be reserved, during the continuance thereof, such part of the lead or copper ore, coal, and other produce, to be gotten from the said mines, or such yearly rent as can be reasonably had without taking any fine, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder expectant on the determination of the said respective leases; and so as the respective lessees be not by any express clause free from impeachment of waste, other than in the necessary and reasonable mining or working thereof; and so as the said respective lessees do seal and deliver a coun-

1816.

Doe dem. Earl of Jersey *against* Smith.

a counterpart; and so as there be also inserted such proper and usual covenants for the effectually mining and working the said mines, &c. as are usually inserted in leases of the like nature."

The marriage took effect on the 20th of *July*, 1757, and afterwards, on the 5th of *September*, 1803, the said Lord *Vernon*, by indenture of that date, in consideration of the surrender of a former lease, and of 105*l.* paid to him, and of the yearly rents thereby reserved, demised to *C.* and *H. Smith* the premises in question, *habendum* to them, their executors and administrators, from the day of the date thereof, for 99 years, if they and *John Smith*, son of the said *C. Smith*, or either of them, should so long live, at the yearly rent of 2*l.*, payable at *Michaelmas* and *Lady-day*, and one couple of fat capons, or 1*s.* 6*d.* in lieu thereof, at the option of Lord *V.* or the person entitled to the inheritance, also an heriot of the best beast, or 40*s.* in lieu thereof, at the like option, upon the decease of every tenant dying in possession, and a like heriot upon every assignment or alienation. And the said *C.* and *H. Smith*, for themselves, their heirs, &c. covenanted to and with Lord *V.*, his heirs, and to and with such person to whom the immediate freehold should belong, to pay the said rent and heriots; *provided that, if at any time, during the said estate thereby granted, the said rent of 2l., and every or any of the duties, services, reservations, and payments thereby reserved, or any part thereof, should be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could be had upon the said premises, whereby the same, and all arrearage thereof, might be*

 fully

1816.

Doe dem. Earl of Jersey against Smith.

fully raised, levied, and paid, &c.; or if any default should be, by the said *C.* and *H. Smith*, their executors, administrators, and assigns, in the payment or performance of all or any of the reservations, covenants, and agreements hereinbefore on their parts contained, *then and from thenceforth, in all or any or either of the said cases it should and might be lawful to and for the said Lord* Vernon, *his heirs and assigns, and the person to whom the freehold or inheritance of the premises should as aforesaid belong, into and upon the said premises to re-enter, and the same to have, as in his and their former and proper estate*, &c. The former lease, mentioned to be surrendered in the indenture of the 5th *September*, 1803, was a lease of the same premises, for a term of years, determinable on three lives, which was a subsisting lease before and at the time when the above-mentioned settlement of the 2d *July*, 1757, was made, but the lives therein had dropped previously to the day of the demise in the declaration. The several rents, duties, reservations, and payments, reserved by the said indenture of the 5th of *September*, 1803, were the ancient and accustomed yearly rents and services, and were as great and beneficial as those at the time of making the said settlement of the 2d of *July*, 1757, or at any time thereafter; and the usual and accustomed form of leases, of the estate contained in the said settlement, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the said indenture of the 5th of *September*, 1803. *C. Smith*, one of the lives, died on the 1st day of *January*, 1813. *H.* and *J. Smith* are still living. The special verdict then derived title to the lessor of the plaintiff, under the will of the said

Louisa

Louisa Barbara Lady *Vernon*, who died on the 1st *January*, 1781, and by subsequent conveyances, to all the lands and tenements devised by the said will of the said Lord *Mansel*, subject to the life-estate of the said Lord *Vernon*, who afterwards died.

1816.
Doe dem. Earl of Jersey *against* Smith.

And two points were made for the plaintiff upon this special verdict, 1st, That the lease of the 5th *September*, 1803, was not a valid lease under the power given by the marriage-settlement of Lord and Lady *Vernon*. 2dly, That evidence ought not to have been received as to what had been the form of other leases of the estates contained in the said marriage-settlement, and that the finding as to what had been the usual and accustomed form of other leases was wholly irrelevant.

These points were debated at *Serjeants' Inn* before this term, by *Littledale* for the plaintiff, and *Gifford* for the defendant. The argument for the plaintiff was in substance this; that by the power, as it regards leases for lives or for years determinable on lives, it was required, that in every such lease there should be contained a general clause, that is, unconditional as to time and circumstances, for re-entry for non-payment of rent; whereas this re-entry was re-strained for fifteen days after the day of payment, and by a condition that a sufficient distress cannot be had on the premises. As to the former of which restraints, *Litt. sects.* 325. 328. were quoted; and it was said, if the re-entry might be postponed for fifteen days after the day of payment, as well might it be for a month or for half a year after, whereby the interest of the reversioner would be greatly prejudiced; and where it was intended by the power that time should be allowed, it is so expressed, as upon leases for years absolute, twenty-eight days, after the day of payment, are allowed; whence

1816.

Doe dem. Earl of Jersey against Smith.

it follows, that where no time is expressed, it was intended that none should be allowed. And *Coxe* v. *Day* (*a*) was cited as an authority to shew, that a proviso for re-entry, if no sufficient distress can be had, is not in conformity to such a power as the present; and the same was recognized in *Doe* v. *Meyler*. (*b*) In *Hotley* v. *Scott* (*c*) the lease was upheld on a different ground. Upon the second point it was said, that the authority of *Cooke* v. *Booth* (*d*), in which case evidence of former leases was received to explain the meaning of a covenant for renewal, had frequently been denied, as in *Baynham* v. *Guy's Hospital* (*e*), *Eaton* v. *Lyon* (*f*), *Moore* v. *Foley* (*g*), and *Iggulden* v. *May*. (*h*)

On the other hand it was denied that, according to the fair interpretation of this power, a re-entry was required at the days on which the rent was payable; for the power only says, that in every lease such as the present "there be contained a power of re-entry for non-payment of the rent thereby reserved;" and here the lease does contain such a power, not indeed of immediate re-entry, for that is not required, but of re-entry in fifteen days after the day of payment; as to which, the argument that it might as well have been extended to a month or half a year after does not hold, because the extension will only be good if it be reasonable, and whether reasonable or not must depend upon what is usual, or what was before and has since been done in similar leases of the same premises; as to which the

(*a*) 13 *East*, 118.
(*b*) Ante, vol. ii. 276.
(*c*) *Lofft. Rep.* 316.
(*d*) *Cowp.* 819.
(*e*) 3 *Ves.* 295.
(*f*) Ibid. 690.
(*g*) 6 *Ves.* 232.
(*h*) 9 *Ves.* 325. 7 *East*, 237.

finding

finding here is conclusive. With respect to *Coxe* v. *Day*, it forms no rule for the decision of this case, which turns upon a totally different state of facts, and upon the intention of the settlor, who created the power; besides, *Hotley* v. *Scott* is *contrà*. And it is remarkable that in *Jones* v. *Verney* (a), where the power required a clause of re-entry as general as the present, and the lease contained a clause of re-entry for non-payment of the rent in forty-two days after the day of payment, though the validity of the lease was disputed on various grounds, this objection was never mentioned, so little was it thought tenable.

At the conclusion of the argument Lord *Ellenborough* C. J. said, that this was a case very fit to be considered, whether it were viewed with regard to the magnitude of the property in dispute, or as affecting the general construction of powers of this sort; that only two Judges were in a situation to pronounce any judgment, the other two having, when at the bar, been engaged in the case. Perhaps, his Lordship added, it might come to a very nice and critical consideration as to the import of the term, *a power*, whether *a* meant *any* or *some*.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an ejectment, brought to recover certain lands, leased under the authority of a power contained in the marriage-settlement of Mr., afterwards Lord *Vernon*, and *Louisa Barbara Mansel*, his wife. The

(a) *Willes*, 169.

1816.

Doe dem. Earl of Jersey against Smith.

power is as follows: (here his Lordship read the power.) There are other provisions which relate to leases for years only, so as there be reserved the like beneficial rent as now is, or the best and most improved yearly rent, &c. (and then as to leases for years) that there shall be contained a clause of re entry in case the rent be behind or unpaid by the space of 28 days after reserved. The first part of the power, therefore, relates to leases for lives, or for years determinable upon lives, upon which it would be sufficient to reserve the ancient rents; and the second part of the power to leases for years, upon which the best and most improved yearly rents that could be reasonably had or obtained, were to be reserved; and upon the former (leases for lives or for years determinable on lives) there was to be "a proviso of re-entry for non-payment of the rent thereby to be reserved;" upon the latter (the leases for years) there was to be a clause of re-entry, in case the rent were behind or unpaid by the space of 28 days after the times appointed for the payment thereof; in the one case it being left undefined what was to be the tenor of the clause of re-entry, in the other it being provided that such clause should fix the right of re-entry to the period of 28 days after the rent should have become due. The same Lord *Vernon*, who is mentioned in the said marriage-settlement and leasing power therein contained, (and who was tenant for life, with a power of leasing under that settlement,) afterwards, on the 5th of *September*, 1803, executed a lease to one *Charles Smith* and *Henry Smith*, for years determinable on lives; such lease is now sought to be set aside by this ejectment, brought by the lessors of the plaintiff, who have since, by devise, and by lease and release, become entitled to the premises

1816.

Doe dem. Earl of JERSEY *against* SMITH.

mises in question, in fee, subject to the lease created under this power; which is now sought to be set aside, on the ground of its not being conformable to the terms of the power on the subject of re-entry, which such a lease (*i. e.* a lease for years determinable on lives) is required by the power to contain. The power directs that, there be contained in every such lease "a power of re-entry for non-payment of the rent;" it does not say what power, but "a power only;" and it does so. The lease executed under this power contains the following provision: "Provided always, that if it shall happen, at any time during the said estate hereby granted, that the said yearly rent or sum of 2*l.*, and every or any of the duties, services, reservations, and payments hereby reserved, or any part thereof, shall be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, then and thenceforth it shall and may be lawful to and for the said *George* Lord *Vernon*, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall belong, upon the said premises hereby demised, and into every part and parcel thereof, wholly to re-enter, and the same to have, hold," &c. The lease likewise contains provisions for re-entry upon other defaults and breaches of covenant; but as the power in question only relates to re-entry for *non-payment of rent*, the statement of the others is immaterial. It is contended, that the leasing power requires that a provision for re-entry for non-payment of rent, perfectly general and unqualified in its terms, should be

expressed

1816.

Doe dem. Earl of Jersey against Smith.

expressed in the leases which are to be made under it, inasmuch as the power itself contains no qualification, and is only required to be "a power of re-entry for non-payment of rent." Under a power of re-entry, thus general and unqualified, the effect would be, that the tenant for years determinable on lives might be instantly ejected, the moment his 2*l.* annual rent was in arrear, although upon the rack-rent being in arrear on leases for years absolute, and where the rent might be of some valuable amount, the power does not allow a re-entry, until after 28 days' arrear. Thus making the rigour of the rule extreme, when there is the least reason for enforcing it. When the construction of a power leads to such unreasonable and inconvenient consequences, it naturally produces a disposition to examine, with some exactness, the terms in which the power is contained, and to see whether the letter of the provision does absolutely require such a construction. The leasing power says that the lease must contain *a* power of re-entry *for* non-payment of rent, not *on* non-payment of rent, nor to be exercised immediately upon the occurring of that default. It is silent as to the time when it should be carried into effect; and being so silent, why should it not, in virtue of such silence, be intended that the creator of the power thought it enough to require that there should be some reasonable power of re-entry for non-payment of rent upon every lease, leaving it to the discretion of the person by whom it should be granted to prescribe when and under what circumstances that power of re-entry should in each particular case be enforced? By requiring that the leases shall always contain a power of re-entry, he calls the attention of the successive lessors from time to time to the subject, whenever

1816.

Doe dem. Earl of Jersey *against* Smith.

whenever the occasion of leasing should recur; and when the attention of the lessor, is called to it, it is hardly likely that he should in any case, in the exercise of a proper discretion, introduce into his lease so harsh and rigorous a provision, as the letter of this provision would, upon the construction now contended for, introduce universally and in all cases whatsoever. In the exercise of a proper discretion, he would probably adopt the usual clause of re-entry, which he should find inserted in the former leases of the same property, or would in some other mode qualify it by reference to the time during which the rent had been in arrear, or to the want of adequate means of enforcing the payment of it by distress, or by both; but in no case under the guidance of a sound discretion would he give a power of re-entry, which would be exercised summarily, immediately, and universally, without an hour's respite to be allowed in favour of the tenant. Besides, what eligible tenant would accept a lease containing a provision so inconvenient and degrading, and under which he might be thus instantly dispossessed for the default of a single moment. By construing the words, "*A* power of re-entry," as meaning *any* or *some*, the provision, it will be said, contains too little of restraint upon the person who is to exercise the power; but by the other construction, by which it is made to mean a general and absolute power of re-entry, unqualified by any consideration of time or other circumstances, it is made to import too much. Of the two constructions of which the indefinite words in question are susceptible, it is certainly the safest course to understand them as speaking that sense which best accommodates itself with the convenience of the parties who are to be governed

by

1816.

Doe dem. Earl of Jersey against Smith.

by them, in a case where the framer of the restraint had it in his power to have prescribed the rule in such terms as he pleased, and which would have obviated all doubt, and which he might reasonably have been expected to have done, had he thought the powers of re-entry in the subsisting leases open to objection. In such a case, we do not conceive ourselves as contravening any legitimate rule of construction, when we hold that the restraint of leasing should not in this case be carried, in construction, to an extent which is to leave no discretion in the person executing the power. And supposing we are right in so holding, we further think that the discretion which, upon such construction, is necessarily left to the person who is the object of the power, has been well exercised in the present instance. As to the other objection, which has been taken to the admission in evidence of other leases of the same premises, in order to prove as stated in the special verdict, that the usual and accustomed form of leases of the estate contained in the marriage-settlement or deed of 2d *July*, 1767, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in the indenture in question of 5th *September*, 1803; this objection does not, upon the view we have already taken of the case, arise in the present instance. For, if we are right in holding that the person who had to exercise the leasing power had any discretion as to the terms of that proviso of re-entry which he is generally required to insert in his leases, for years determinable on lives, he might certainly, with great propriety, refer to those former leases as a guide to the discretion which he should exercise on the subject; and the Court, in judging

1816.

DOE dem. Earl of JERSEY *against* SMITH.

judging of the manner in which such discrétion had been exercised, might as fitly look to the former leases on the subject. Upon this ground it is unnecessary to discuss the cases of *Cooke* v. *Booth* and *Iggulden* v. *May*, which do not apply to a case of a lessor who has a discretion to exercise as to the terms of his leases. There are other grounds also upon which the admissibility of this evidence might be maintained, which were, in part, discussed on the argument, but which are not necessary to be adverted to again upon this occasion. The result of our opinion upon the whole is, that the lease in question is not at variance with the power; that the former leases were properly admissible in evidence, and that the defendant is entitled to the judgment of this Court.

Judgment for defendant. (*a*)

(*a*) This judgment was afterwards reversed in the Court of Exchequer Chamber, (see 1 *Brod. & Bing.* 97.); but the judgment of the Exchequer Chamber was afterwards reversed in the House of Lords, and the judgment of this Court affirmed. See 2 *Brod. & Bing.* 473.

1816.

Saturday, November 23d.

DOE on the several Demises of SCOTT and Others *against* ROACH and Others.

Devise to *J. N.*, his heirs and assigns for ever, and if *J. N.* shall happen to die without any issue of his body lawfully begotten on the body of his present wife, or of any subsequent wife or wives, the lands, &c. afore given to *J. N.*, and his heirs after the death of *J. N.*, and his wife or wives aforesaid, shall go and remain to all the children of *M. D.*, share and share alike, to hold as tenants in common: Held, that *J N.* having died without issue in the lifetime of testatrix, leaving a widow who survived testatrix, the remainder to the children of *M. D.*, which would have been a contingent remainder if *J. N.* had survived testatrix, might take effect as an executory devise, so as to preserve the limitation to the children of *M. D*, and that the children of *M D.*, living at the death of testatrix, together with an afterborn child, took an estate for life in equal shares at the death of the widow of *J. N.*, and that the shares of such of the children as died after testatrix, and before the widow of *J. N.*, did not pass to the survivors, but went to the heir at law of testatrix.

IN ejectment for certain messuages and lands in the parish of *Carisbrooke*, in the *Isle of Wight*, upon eight several demises, there was a verdict for the plaintiff, at the *Lent* assizes, 1815, for the county of *Hants*, subject to the opinion of the Court on the following case:

Jane Russell being seised in fee of the premises in question, by her will, dated 25th *July*, 1775, after an introductory clause, stating that this was her will, touching the settling and disposing of such worldly goods, chattels, and estates, as it had pleased God to bless her with, and directing, first, that all her just debts and funeral expenses should be paid by her executor, within a convenient time after her decease, and bequeathing to her son *John Pope*, her heir at law, one guinea, to buy him a ring, and devising to her grandson, *Henry Trattle* and his heirs, all her right or share in one-fourth part of a mill at *Carisbrooke*, and giving sundry legacies, which she directed should be paid by her executor, at the end of twelve calendar months after her decease, devised as follows: "Also all my lands, tenements, messuages, and hereditaments, whatsoever and wheresoever they shall be, whereof I or any other

person

1816.

DOE dem. SCOTT against ROACH.

person or persons in trust for me is or are, or shall or may be seised or possessed of, or interested in, or entitled unto, in possession, reversion, remainder, or expectancy, or whereof I have any power to dispose (except what I have in this my will before given), *I give and devise unto my grandson,* John Newnham, *his heirs and assigns for ever,* and all the rest, residue, and remainder of my goods, chattels, money, and securities for money, of what nature or kind soever they be, and wheresoever they shall be, and all my stock and personal estate whatsoever, and not hereinbefore disposed of, I give and bequeath unto my said grandson, *John Newnham,* subject, nevertheless, to the payment of the several legacies and weekly sum above mentioned; *provided always, nevertheless, and it is my will, intent, and true meaning, that if my said grandson,* John Newnham, *shall happen to die without any issue of his body, lawfully begotten on the body of his present wife that now is, or on the body or bodies of any subsequent wife or wives, that those messuages, &c. with the appurtenances that I have afore given unto the said* John Newnham *and his heirs, after the death of the said* John Newnham *and his wife or wives as aforesaid, shall go and remain to all the children of my grandaughter,* Mary Dennett, *share and share alike, and to hold as tenants in common, and not as joint tenants.*" And she appointed the said *John Newnham* sole executor of her said will. *John Newnham* died without issue, in the lifetime of the testatrix, leaving a widow. The testatrix died on the 27th *November,* 1781, without revoking or altering her will, at whose death *John Pope,* her only son and heir at law, entered into possession of the lands in question, and held them during his life, and those claiming under him have since continued in possession,

and

1816.

Doe dem. Scott against Roach.

and the defendants who claim under him, and are also the heirs at law of the testatrix, are now in possession. At the death of the testatrix there were living ten children of *Mary Dennett*, three of whom afterwards died. *Mary Dennett* had another child born after the death of the testatrix. This child, with the other seven, one of whom was the heir at law of the three who died, were severally the lessors of the plaintiff. The widow of *John Newnham* died the 28th *April*, 1814. The question for the opinion of the Court was, whether the plaintiff was entitled to recover the lands in question, or any part thereof.

This case was twice argued, first, in *Michaelmas* term, 1815, by *Sugden*, for the plaintiff, and *Gifford*, for the defendants; and again, at the sittings at *Serjeants' Inn*, before this term, by *Gaselee*, for the plaintiff, and *Richardson*, for the defendants. And the principal question was, as to the nature of the devise to the children of her grandaughter, *Mary Dennett*; as to which it was argued, though not much insisted on, for the plaintiff, that the devise to them was, *ab origine*, an executory devise, being a limitation after a devise in fee to *John Newnham*. But the main argument was this, that admitting that by reason of the general intent, notwithstanding the particular devise in fee to *J. N.*, only an estate tail would have passed to *J. N.*, if he had survived the testatrix, with a contingent remainder to the children of *M. D.*; yet, by his death, in the lifetime of the testatrix, whereby the devise to him became lapsed, the contingent remainder was turned into an executory devise; and for this reason, *ut res magis valeat quam pereat;* because, as it was no longer capable of subsisting as a contingent remainder, by reason of the failure

of

1816.

Doe dem. Scott against Roach.

of the particular estate, by the death of *J. N.*, if it could not enure in any other mode, the intention of the testatrix must fail altogether. But the law, which is ever mindful to effectuate, as far as may be, the intentions of testators, and for this purpose regards the substance of the devise, and not the form of carrying it into effect, will, in this instance, execute the intention, by holding this to be an executory devise, notwithstanding that, under other circumstances, it would have enured as a contingent remainder. (*a*) Another question was, as to the estate which the children of *M. D.* took; and it was argued, that they took a fee, as well from the intention manifested by the introductory clause to dispose of the entirety, and the disherison of the heir at law, as from the language of the devise, "*that the messuages which she had before given to* J. N. *and his heirs, should go and remain to the* children of *M. D.* Another question was, whether the after-born child of *M. D.* was entitled to take; as to which it was argued in the affirmative, upon the authority of several cases. (*b*) The last question was, whether the shares of those children of *M. D.*, who died after the testatrix, and before the widow of *J. N.*, went to the survivors, and it was argued that they did, inasmuch as the devise was to them as a class. (*c*)

On the other hand it was insisted, that no rule was better established or more uniformly followed, without exception, than the rule laid down by Lord *Hale* re-

(*a*) *Hopkins* v. *Hopkins*, *Cas. T. Talb.* 44.

(*b*) *Ellison* v. *Airey*, 1 *Ves.* 111. *Baldwin* v. *Karver*, *Cowp.* 309. *Walter* v. *Shore*, 15 *Ves.* 122. *Doe* v. *Bradley*, 16 *East*, 309.

(*c*) *Viner* v. *Francis*, 2 *Bro. Ch. C.* 658. *Crooke* v. *Brooking*, 2 *Vern.* 106. *Doe* v. *Sheffield*, 13 *East*, 526.

1816.

Doe dem. Scott against Roach.

specting executory devises, viz. that where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only. (a) And many authorities were quoted (b) to shew that this was an estate tail in *J. N.*, and therefore capable of supporting the remainder. And as to the doctrine that this, which in its inception was a contingent remainder, might shift with events and become an executory devise, it seems strange to say, that a subsequent accident shall have the effect of changing the meaning of words from their original import, into something which, but for that accident, they could never have meant; and notwithstanding the authority of Lord *Talbot* to this effect, it may well be doubted; for Lord *Mansfield* was of opinion, "that if an executory devise was too remote in its creation, the event could not vary the construction." (c) Now, here the devise over is too remote, not being to take effect until an indefinite failure of issue of *J. N.*; for the contingency is, if *J. N.* die without issue, which means a general failure of issue, and there are no words importing a failure at the time of *J. N.*'s death. (d) And according to the plaintiff's construction, the children of *M. D.* will be in a better situation by the death of *J. N.* in the lifetime of the testatrix,

(a) *Purefoy* v. *Rogers*, 2 *Wms. Saund.* 388. and *n.* 9. *Doe* v. *Morgan*, 3 *T. R.* 765.

(b) *Brice* v. *Smith*, *Willes*, 1. *Doe* v. *Ellis*, 9 *East*, 382. *Wood* v. *Baron*, 1 *East*, 259. *Tenny* v. *Agar*, 12 *East*, 261. *Altham*'s case, 8 *Rep.* 154. *b.* *Co. Lit.* 21. *a.* *Bamfield* v. *Popham*, 1 *Pr. Wms.* 57. in not.

(c) *Goodman* v. *Goodright*, 2 *Burr.* 878.

(d) *Pells* v. *Brown*, *Cro. J.* 590. *Goodright* v. *Searle*, 2 *Wils.* 29. *Forth* v. *Chapman*, 1 *P. Will.* 663. *Porter* v. *Bradley*, 3 *T. R.* 143.

testatrix, than if he had died after, for then the remainder would have been destroyed. As to the next point, it was denied that a fee passed to the children of *M. D.*; for there were no words of inheritance, nor does the word "remainder" supply the want of those words. Upon the last point it was said, that the cases of *Viner* v. *Francis*, and *Crooke* v. *Brooking*, applied only to a bequest of personalty, and in *Doe* v. *Sheffield*, the class pointed out by the testator consisted but of one individual at the time he made the devise.

1816.
Doe dem. Scott against Roach.

At the conclusion of the argument Lord *Ellenborough* C. J. observed, that the case had been very ably and elaborately argued upon both occasions; that the difficulty was not in discovering the intention of the testatrix, but in reconciling that intention with the technical rules of law; of which, however, the Court would consider.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This was an ejectment by eight of the children of *Mary Dennett*, who claimed under the will of *Jane Bussell*. By that will *Jane Bussell* devised as follows: "To *John Newnham*, his heirs and assigns for ever, provided that if he should happen to die without any issue of his body begotten on the body of his then or any future wife, then the messuages, &c. I have afore given to him and his heirs, after the death of the said *J. Newnham* and his wife or wives, as aforesaid, shall go and remain to all the children of my grand-daughter, *Mary Dennett*, share and share alike, and to hold as tenants in common, and not as joint-tenants." *John Newnham* died before the

 testatrix,

1816.

Doe dem. Scott against Roach.

testatrix, so that the devise to him lapsed. He died without issue of his body, but he left a widow, who survived the testatrix. The widow is since dead. *Mary Dennett* had ten children living when the testatrix died, three of whom died before *John Newnham*'s widow, and she had another child before *John Newnham*'s widow died. The ejectment is brought on the several demises of these eight surviving children, and the questions are, whether they are entitled to recover the whole, or any, and what parts of the estate devised. When this will was made, the devise to *John Newnham* would have given him an estate tail, and the limitation to the children of *Mary Dennett* would have operated by way of contingent remainder, but by the death of *John Newnham* in the life of the testatrix, his estate lapsed. *Mary Dennett*'s children were not entitled to take during his widow's life; the law could not raise an estate for life by implication in such widow's favour, and then there was no estate of freehold to support the limitation to *Mary Dennett*'s children. Unless that limitation, therefore, might, by the lapse of *John Newnham*'s devise, operate by way of executory devise, it could not take effect, and it was accordingly urged on behalf of the lessors of the plaintiff, that it might operate by way of executory devise. *Hopkins* and *Hopkins*, Cases *Temp. Talbot* 44. is an authority in point, that the lapse of a devise in the testator's lifetime may make a limitation operate by way of executory devise, which, upon the face of the will itself, and but for that lapse, would have operated by way of contingent remainder. The case of *Hopkins* and *Hopkins* is noticed by Lord C. J. *Willes* in *Doe* v. *Underdown*, *Willes* 297., as "a case of very great authority, and considered by Lord *Talbot* thoroughly and well;" Lord *Mansfield* mentions

1816.

Doe dem. Scott against Roach.

mentions it, apparently with approbation, in *Doe* v. *Fonnereau*, *Doug*. 509., and it has now stood so long as a rule of property, (see *Fearne*, 3 *Ed*. 231. 401. 419. 434.) that (though the decision might have been unnecessary, because there was a sufficient estate in the trustees to support the limitations as remainders,) it cannot now be questioned. Admitting, however, the authority of *Hopkins* v. *Hopkins*, there are two grounds upon which its influence upon this case are disputed; the one, that the limitation to the children of *Mary Dennett* is too remote as an executory devise, because it is not to take effect until after an indefinite failure of *John Newnham*'s issue; and, secondly, that if it be allowed as an executory devise, it will put *Mary Dennett*'s children in a better situation than if *John Newnham* had survived the testatrix, and then died before his widow; because in that case, the limitation to *Mary Dennett*'s children would have been a contingent remainder; and upon *John Newnham*'s death without issue before his widow, the only freehold to support the remainder would have been removed, and the remainder would consequently have failed. Another objection is, that if the limitation operates by way of executory devise, it may let in children of *Mary Dennett*, who, if it were a contingent remainder, would have been excluded. As to the first objection, that this is too remote, it seems a sufficient answer to say, that upon the original limitations, when there was an estate tail to *John Newnham*, the limitation to *Mary Dennett*'s children was free from all exception; and when it was converted into an executory devise, by *John Newnham*'s death, there was no issue of *John Newnham*; so that the only event for which *Mary Dennett*'s children then had to wait, was, not a failure of *John*

 Newnham's

1816.

Doe dem. Scott against Roach.

Newnham's issue, (for that failure had taken place,) but the death of *John Newnham's* widow only. Upon the other questions, it is material to advert to some of the rules for the construction of wills. One rule, as stated by *Willes* C. J. in *Doe* v. *Underdown*, *Willes*, 296., and to be found in many other cases, is this: that the intent of the testator ought always to take place, where it is not contrary to the rules of law. And another rule laid down in the same case is, that the intent ought always to be taken as things stood at the time of making the will, and is not to be collected from subsequent accidents which the testator could not foresee. In *Hodgson* v. *Ambrose*, *Dougl.* 341. *Buller* J. expresses the first of these rules in nearly the same terms; but he adds, what is very material to this case, that the question, whether the intention be consistent with the rules of law can never arise till it is settled what the intention was. The first thing, therefore, for consideration always is, what was the testator's intention at the time he made his will; and then the law carries that intention into effect as nearly as it can, according to certain settled technical rules; in some cases by way of contingent remainder, in some by way of executory devise, and in others by other modes. The manner, however, of carrying it into execution, whether by way of remainder, or executory devise, or by any other mode, rarely enters into the mind, or constitutes any part of the intention of the testator; and where it cannot be collected from the will that that was the case, the difference between the legal effect of a contingent remainder and that of an executory devise, cannot prevent the Court from carrying a devise into effect by way of executory devise, which, but for a change of circumstances between the making

1816.

Doe dem. Scott against Roach.

making of the will and the testator's death, it must have treated as a contingent remainder. It may be very true, this may have the effect of defeating the heir at law in cases in which, had there been no change of circumstances, and the limitation had continued a contingent remainder, he would have been entitled, or of letting in claimants who, but for the change, would have been excluded; but in either case the heir at law would be let in, or the claimant would be excluded, in opposition to the intention of the testator, by some technical rule of law; and it is therefore more effectually advancing the testator's intention to adopt such mode for carrying the intention into effect, as at the testator's death was the only practicable mode, and the loss of benefit which would thereby accrue to persons who were never intended to be benefited at all, and who would only be benefited by the pressure of some rule of law in opposition to the testator's will, ought not to interfere with, or prevent that adoption. Upon this will it is quite clear what was the intent of the testatrix when she made her will. She meant to benefit *John Newnham* and his issue in the first place, and in the next place *Mary Dennett's* children, and from the general words she has used without confining it to any of *Mary Dennett's* children in particular, she evidently meant to include all the children *Mary Dennett* should ever have. As circumstances stood when the will was made, the limitation to *Mary Dennett's* children must have been construed a contingent remainder, not because the testatrix meant it to operate in that particular mode, that is, by way of contingent remainder, nor because her intention would be most effectually carried into effect by treating it as a contingent remainder, but

 because

1816.

Doe dem. Scott *against* Roach.

because it is a rule of law, that no limitatation shall operate by way of executory devise, which, at the time of the testator's death, was capable of operating by way of contingent remainder. Where a limitation operates by way of contingent remainder, it is liable to be defeated in many instances by the failure or destruction of the particular estate, which, by a technical rule of law, must continue *in esse* in order to support it, and then persons are let in in opposition to the testator's intention; whereas a limitation which operates by way of executory devise can never be defeated, and therefore that mode of carrying the intent into effect is always most in unison with the intent of the testator. As, therefore, *Hopkins* v. *Hopkins* is an authority that the lapse of a devise in the life of the testator may turn into an executory devise what would otherwise have operated as a contingent remainder, as the limitation in this case is not too remote for an executory devise, and as it will further the intent of the testatrix so to consider it, it seems to us that the operation in this case, by way of executory devise, ought to be allowed. The next question is, what estate *Mary Dennett*'s children take, whether for life or in fee; and as there are no words of inheritance or perpetuity, nor any words denoting the *quantum* of interest in the property, but the devise is merely that these messuages, lands, tenements, and hereditaments which the testatrix had given to *John Newnham* and his heirs, should go and remain to *Mary Dennett*'s children, it seems to us that they can only take life estates. The remaining question is, whether the lessors of the plaintiff are entitled each to one-eighth of this property or only to one-eleventh, in other words, whether the shares of the three children

of

of *Mary Dennett*, who died since the testatrix, are to go to the heir at law, or to increase the shares of *Mary Dennett*'s children. Had the limitation to each child been in fee, *Doe* v. *Perryn*, 3 *T. R.* 484., *Doe* v. *Dorvell*, 5 *T. R.* 518., and *Meredith* v. *Meredith*, 10 *East*, 503., are authorities that each child's share would have vested in interest on the death of the testatrix, and the death of any one before his interest vested in possession would have passed nothing to the survivors; and as there are no words to confine the gift to such children of *Mary Dennett* as should survive *John Newnham*'s widow, and each child's share became a vested interest upon the death of the testatrix, we think the shares of those who died passed to the heir at law, and that the survivors are only entitled to eight-elevenths.

1816.

DOE dem. SCOTT *against* ROACH.

The KING *against* The Inhabitants of DARLINGTON.

Saturday, November 23d.

ON appeal, an order for the removal of *Elizabeth*, the widow of *Meredith Sedgwick*, and her children, from *Brompton*, in the county of *York*, to *Darlington*, in the county of *Durham*, was confirmed, subject to the opinion of this Court, on the following case.

Mary Sedgwick, of *Brompton* aforesaid, by her will, made the 10th of *December*, 1814, devised the messuage or dwelling-house, with the garth and appurtenances thereunto

Devise to the use of trustees in fee, in trust, (after payment of debts,) to receive the rents for the benefit of her brother, *M. S.*, his wife and children, all or any of them, during his life, as they should think proper, and after his decease, in trust for her nephew, &c. Held, that *M. S.*, who, after the death of testatrix, by permission of the trustees, occupied until his death, a cottage in the township where the lands devised were situate, did not acquire a settlement thereby, the rents and profits of the said lands having been insufficient to pay testatrix's debts; and *M. S.*, at the testatrix's decease, and from that time until his own decease, being an uncertificated bankrupt.

1816.

The King *against* The Inhabitants of Darlington.

thereunto belonging, situated in *Brompton* aforesaid, then in her occupation, and her pew in the church of *Brompton*, unto and to the use of *George Jackson* and *William Marwood*, their heirs and assigns, in trust for her niece, *Mary Annabella Sedgwick*, daughter of her brother, *Meriton Sedgwick*, her heirs and assigns for ever; provided always, that if her said niece should die under the age of 21, without leaving lawful issue, then upon the like trust for her niece, *Anna Maria Sedgwick*, another daughter of her said brother, and subject to the like proviso in trust for her nephew, *Marmaduke Sedgwick*, son of her said brother, his heirs and assigns for ever; and she directed her trustees to receive the rents of the said messuage, &c., and to place the same out at interest, to accumulate; and on such one of her nieces first attaining the age of 21, the said accumulations to be paid to her; and she gave her household goods and furniture, plate, linen, china, and wearing apparel, unto her said two nieces, share and share alike, and devised and bequeathed all her other messuages or dwelling-houses, hereditaments, and real estate, situate in *Brompton* aforesaid, and all her personal estate, (after payment and satisfaction of all her just debts and funeral expenses, and the proving and registering of her will, wherewith she charged the same) unto and to the use of the said trustees, their heirs, executors, administrators, and assigns respectively, in trust to receive, and pay and apply the yearly rents and proceeds thereof, as the same should be received, for the benefit of her said brother, his wife and children, all or any of them, during his life, as they should think proper; and immediately after his decease, the same messuages or dwelling-houses, hereditaments, real and personal estates, should be in trust for her said nephew, *Marmaduke*, his heirs, executors,

administrators,

administrators, and assigns respectively; and if the said *Marmaduke* should die under the age of 21, without leaving lawful issue, then in trust for her nephew, *Richard Meriton*, another son of her said brother, his heirs, executors, administrators, and assigns for ever; and she appointed the said trustees her executors.

1816.

The KING against The Inhabitants of DARLINGTON.

The testatrix died on the 20th *June*, 1815, and upon her death, *Meriton Sedgwick* and his family immediately left *Darlington* (where they had acquired a settlement) and went to reside at *Brompton*. *Meriton Sedgwick* did not occupy any part of the premises devised in trust for him or his family, but he occupied, by permission of the trustees, another cottage or dwelling-house, worth three or four pounds per annum, part of the property of the testatrix, devised in trust for the said *Mary Annabella Sedgwick*, and resided therein from *June*, 1815, until his death on the 28th *December* following. *Meriton Sedgwick*, at the time of the testatrix's death, and also at his decease, was an uncertificated bankrupt. The *personal estate of the testatrix, and the rents and profits of the premises were insufficient for the payment of her debts, and the trustees did not pay or appropriate any part of* the rents and profits for the benefit of *Meriton Sedgwick* or his wife, or any of their children, during the life of *Meriton*, the same being applied to the discharge of the testatrix's debts; and a considerable portion of debt remained undischarged at the time of the said *Meriton*'s decease. The question was, whether the said *Meriton* took, under the devise, such an interest as enabled him to gain a settlement by his residence at *Brompton*.

Coltman and *Gilby*, who were against the order of sessions, were called upon by the Court; and they argued, that

1816.

The King *against* The Inhabitants of Darlington.

that by the devise to *Meriton Sedgwick*, a vested equitable interest passed to him, which, coupled with residence in the parish, was sufficient. For the principle upon which settlements of this kind are acquired is this, that a man shall not be removed from his own (*a*), but is entitled to have the care of his property, and for this purpose, to reside in the parish where it is. And an interest acquired by devise will confer a settlement, where, if it had accrued by purchase, it would not (*b*); and an equitable interest is sufficient. As to which they cited *Brown* v. *Higgs* (*c*), *Smith* v. *Ld. Camelford* (*d*), and *Reade* v. *Reade* (*e*), to shew that this was a trust and not a power in the trustees for the benefit of *M. Sedgwick*, whereby an equitable interest was vested in him. So under a devise to trustees to sell, and to divide the surplus, over and above the expences of sale, between *R. B.* and three others, it was holden that *R. B.* had an equitable interest, and gained a settlement by residing upon the estate (*f*); for, according to Lord *Mansfield*, who cites the authority of *Roper* v. *Radcliffe* (*g*), a devisee of the surplus, arising from the sale of lands, after the payment of debts and legacies, has an equitable interest in the lands themselves, it being in his option to pay the debts and legacies and keep the land.

Lord Ellenborough C. J. It was evidently the purpose of the testatrix, knowing probably that her brother, *M. Sedgwick*, was an uncertificated bankrupt, to

(*a*) *Rex* v. *Houghton le Spring*, 1 *East*, 247.
(*b*) *Rex* v. *Sundrish*, *Burr. S. C.* 7.
(*c*) 4 *Ves.* 708. 5 *Ves.* 495.
(*d*) 2 *Ves. jun.* 698.
(*e*) 5 *Ves.* 744.
(*f*) *Dougl.* 767.
(*g*) 9 *Mod.* 167. 181.

abstain

abstain from giving him any vested interest; and therefore she leaves this matter entirely in the control of the trustees. After hearing the argument, I am clearly of opinion that there is not a scintilla of interest in *M. Sedgwick*, either legal or equitable, which entitled him to reside irremoveably in the parish. He was only one of several persons to whom the trustees might, in their discretion, have given the rents, if there had been any to dispose of.

1816.

The KING *against* The Inhabitants of DARLINGTON.

BAYLEY J. I am of the same opinion. The only question submitted to our consideration is respecting the interest of *Meriton Sedgwick*; as to which, it seems to me, that it is only by losing sight of the real question that any doubt can be raised. The foundation of this head of settlement is, that a man is not to be removed from his own. But here the trustees had the estate; first, for the payment of debts, which they were unable to pay in the lifetime of *Meriton Sedgwick*, consequently were not in a condition to empower him to take any thing.

ABBOTT J. I am of the same opinion. If *Meriton Sedgwick* had taken an equitable interest, the intention of the testatrix would have been defeated; because, whatever he took, being an uncertificated bankrupt, it would have passed to his assignees.

Per Curiam,

Order of sessions confirmed.

Hullock Serjt. was in support of the order of sessions.

1816.

Monday, November 25th.

GRAHAM and Others, Assignees of LEIGH, Bankrupt, *against* RUSSELL.

An underwriter, in an action by the assignees of a bankrupt assured, upon a loss which happened after the bankruptcy, may set off a sum due to him for premiums on the balance of accounts between the bankrupt and himself.

THIS case was argued in this Court in *Trinity* term, 1814, by *Littledale* for the plaintiff and *Barnewall* for the defendant, and was afterwards, in consequence of a difficulty arising from the decision of *Glennie* v. *Edmunds* in C. B. (*a*), adjourned into the Exchequer Chamber, and again argued by the same gentlemen before the twelve Judges in last *Easter* term. For a report of this argument, in which a reference to the authorities quoted on the former argument will be found, see 2 *Marsh. Rep.* 561.

Lord ELLENBOROUGH C. J., on this day delivered the judgment of the Court.

This was a question on which some difference of opinion being supposed to be entertained between this Court and the Court of C. B., the case was argued in the Exchequer Chamber. It was an action on a policy of assurance (31st *July*, 1810,) subscribed by the defendant for 200*l.*, at a premium of 10*l.* 10*s.* per cent., with a stipulation for returns, on the ship *Vedra*, on a voyage at and from *London* to *Rio Janeiro*, with or without letters of marque, and back to the united kingdom. Loss by capture. One count of the declaration alleged the interest to be in *John Leigh* to the time of his bankruptcy, and to be in his assignees since that

(*a*) See 4 *Taunt.* 775.

time.

time. Another count alleged the interest to be in *John Leigh.* There were counts for money had and received to the use of *John Leigh* before his bankruptcy, for money paid by him before his bankruptcy, and upon an account stated with him before his bankruptcy, and also for money had and received to the use of the assignees since the bankruptcy, and on an account stated with them since the bankruptcy. Plea, the general issue. At the trial before me at the sittings after *Hilary* term, 1814, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case: The plaintiffs are assignees of *John Leigh*, (bankrupt) under a commission issued on the 11th of *August*, 1811, upon an act of bankruptcy committed on the 9th of that month. *John Leigh* was a merchant and owner of the ship *Vedra*, and he was also an insurance broker. On the 31st of *July*, 1810, *John Leigh* effected the policy in question at *Lloyd's* on his own account, and which was subscribed by the defendant at 10 guineas per cent., with a stipulation for returns not material to the present case. The policy contained the usual acknowledgment by the defendant of the receipt of the premium, but the premium was not in fact paid to the defendant, but was carried by the defendant to the debit of an account subsisting between him and *Leigh*, in respect of other policies effected by *Leigh*, partly as broker and partly on his own account. The *Vedra* sailed in prosecution of her voyage in *September* 1810, and was captured on her homeward voyage on the 24th of *November*, 1811. At the time of the bankruptcy of *Leigh*, he was indebted to the defendant in the sum of 128*l.*, which was made up of the premium on the policy in question, and of the premiums on other policies effected by *Leigh*, partly as broker

1816.

Graham *against* Russell.

broker and partly on his own account, and *Leigh* at that time had credit with the defendant for 19*l.* 19*s.* 11*d.* for returns of premium and settlements of general average, leaving a balance of 108*l.* 0*s.* 1*d.* due from *Leigh* to the defendant. The defendant refused to pay the loss upon the policy in question, contending that he had a right to set off the 108*l.* 0*s.* 1*d.*, or that, at all events, he was entitled to set off the premium (21*l.*) on the policy in question. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the whole 200*l.*, or whether the defendant is entitled to have deducted likewise the sum of 108*l.* 0*s.* 1*d.* or 21*l.*, and the verdict is to be entered accordingly. After the argument in the Exchequer Chamber, it occurred to the Judges that this question very much depended on the construction of the 19th *G.* 2. *c.* 32., which had not been adverted to in the argument. That statute, in the second section, provides, "that the assured in any policy made upon a good and valuable consideration shall be admitted to claim, and after the loss or contingency shall have happened (this relates to prospective and possible loss) to prove his or her debt, in like manner as if the loss had happened before the commission issued, (this is a case of a policy of assurance relating to the assured; I omit, therefore, what relates to the obligors on bottomree, or respondentia,) and shall receive a proportionable dividend in like manner, and the bankrupt shall be discharged from the debt on the policy in like manner to all intents and purposes, as if such loss happened before the commission issued." This statute relates to the case of a bankrupt underwriter, and the case before the Court is that of a bankrupt assured. But the Judges are of opinion,

that

1816.

GRAHAM *against* RUSSELL.

that as the set-off is to be allowed in the case of the bankrupt underwriter, by parity of reason there ought to be the same allowance on the part of a bankrupt assured. The question must, in effect, be the same as if the underwriter had become bankrupt, the assured being indebted to him, and remaining solvent; and, therefore, it may be considered in that way. If a loss happen prior to the bankruptcy of the underwriter, the assured is clearly entitled to prove it under the commission, and, consequently, to bring it into account. His title to do so is recognised by the stat. 19 *G.* 2. *c.* 32. *s.* 2., which is founded upon it, and is an extension of it; for, by that statute, although the loss do not happen till after the bankruptcy, still the assured is enabled to make his *claim immediately*, and to *prove* under the commission when the loss shall afterwards happen, and to receive a rateable dividend with the other creditors. This shews two things, first, that the amount of the loss is to be settled, and allowed under a commission of bankrupt, although the demand sounds in damages; and, secondly, that the perfect and entire division of the bankrupt's estate must wait the event of the voyage; for the assured cannot have a rateable dividend, unless the assignees reserve a portion of the effects to answer a loss in making a distribution (if they do make one) before the event of the voyage is known. If the assured be indebted to the bankrupt underwriter, shall he on that account be deprived of the right which he would otherwise have to enter his claim and prove his loss? And, if he is not deprived of it, he must either have a right to reserve in his own hands so much of the debt owing by himself as will cover the loss, if it shall happen, or to require the assignees, upon pay-

1816.

GRAHAM *against* RUSSELL.

ment to them, to reserve the money, or a portion of it, for him. If this be not done, the time of the happening of the event, and not the nature of the contract or of the contingency, will give the rule of decision; and a contract which would have furnished an item of mutual debt on his part upon an event happening yesterday, will not ever furnish an item of mutual credit upon an event happening to-day. In the present case, the assured has become bankrupt; the underwriter, who is the defendant, remaining solvent, and having an admitted claim to the sum of 108*l.* 0*s.* 1*d.*, proveable against the estate of the bankrupt. The assignees contend, that they have a right to compel the defendant to pay them the whole 200*l.* due upon the policy, and that he must prove his own demand, and take his dividends upon it under the commission. But, as in taking an account between parties, the question, whether any particular item shall be introduced into it, must depend upon the nature and character of the item itself, and not upon the side of the account at which it is to be placed; and, as for the reasons already given, and from the operation of the stat. 19 *G.* 2. *c.* 32., the demand upon this policy would have constituted an item of mutual account if the underwriter had become bankrupt; we think it must also do so in the present case, where the assured has become a bankrupt; and, consequently, the defendant is entitled to deduct the 108*l.* 0*s.* 1*d.* due to him, and the verdict should be entered only for the balance, viz. for 91*l.* 19*s.* 11*d.*

The Duke de MONTELLANO *against* CHRISTIN.

Monday, November 25th.

The Court will not compel a foreign ambassador to give security for costs.

THE plaintiff, who was the ambassador from the court of *Spain*, brought assumpsit against the defendant for money had and received, to which the defendant appeared, and was served with a declaration *de bene esse*. And now it was moved by *Scarlett*, for the defendant, that the plaintiff might give security for costs, upon an affidavit that the plaintiff had been applied to for this purpose, and had given no answer thereto. And it was said, in support of the motion, that the plaintiff, being a privileged person by act of parliament (*a*), it was the same as if he were beyond sea, or out of the jurisdiction of the Court, there being no remedy against him to recover the costs; and *Goodwin* v. *Archer* (*b*) was cited.

But, per Lord ELLENBOROUGH C. J. The case in *Peere Williams* was that of a servant to an ambassador, and no precedent has been mentioned of a like proceeding in the case of an ambassador. The affidavit does not state that there is any intention on the part of the plaintiff to leave the country; and, considering that an ambassador is the immediate representative of the crowned head, whose servant he is, it would hardly be respectful, in the first instance, to exact such a security, unless there were pregnant reasons for believing it to be necessary.

Per Curiam. Rule refused.

(*a*) 7 *Ann.* c. 12.

(*b*) 2 *Peere Williams*, 452. 1 *Eq. Ca. Abr.* 350, *pl.* 4.

1816.

Tuesday, November 26th.

SHARMAN *against* BELL and Another.

An award made by a barrister, to whom all matters in difference are referred by an order of Nisi Prius, is final between the parties, unless for some objection, apparent on the face of the award, or something amounting to misconduct be imputable the arbitrator.

IN this action, which was against the sheriff for a false return to a writ of fi. fa. against the goods of one *Hill*, there was a verdict for the plaintiff, damages 200*l*., subject to the award of a gentleman at the bar, to whom all matters in difference between the parties were referred by an order of Nisi Prius, *Hill* being a party to the reference. The arbitrator made his award, by which he directed that the verdict should be entered for the plaintiff for 90*l*. over and above the costs of the cause.

A rule nisi having been obtained for setting aside this award, on the ground that the arbitrator had mistaken the law, in this, that whereas it appeared by the evidence before him that the warrant of attorney, upon which judgment was entered and the fi. fa. issued against *Hill*, was given collusively by *Hill*, and without any consideration from the plaintiff, nevertheless the arbitrator was of opinion that he was concluded by the judgment. And the affidavit in support of the rule stated, that, after the arbitrator had heard the evidence, he expressed a doubt upon the law, and proposed that the case should be argued before him by counsel, and that he was accordingly attended by counsel, when he stated to them that they were to take the case as it then stood, that no consideration had passed from the plaintiff to *Hill* for the said judgment, and the case was accordingly argued before him upon that objection, among others.

The

1816.

SHARMAN against BELL.

The Attorney-General and *Scarlett*, who shewed cause, objected that, as nothing appeared on the face of the award to raise the question, it was not competent to one of the parties to open the award upon a surmise of error in point of law. And they insisted, that where a matter is referred generally to a barrister, his award is final, unless it can be shewn to be so notoriously against justice and his duty as an arbitrator, that misconduct must be inferred on his part; for which they cited *Chace* v. *Westmore*. (a)

Topping, *Gurney*, and *Espinasse*, contrà, admitted that there was nothing of misconduct imputable to the arbitrator, and that the only ground upon which they could support the rule, was the arbitrator's mistake in point of law in treating the judgment as conclusive evidence of the debt. But they contended, that it was not necessary that the arbitrator's reasons for making his award should appear upon the face of it, in order to enable the Court to examine them. And they relied on *Kent* v. *Elstob*. (b)

Lord ELLENBOROUGH C. J. The rule laid down in *Chace* v. *Westmore* perfectly coincides with my opinion. Where the merits both in law and fact are referred to an arbitrator of competent knowledge, as we must presume a gentleman at the bar to be, and there is not any question reserved by him, the Court will not open the award, unless something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator. This rule has, I believe,

(a) 13 *East*, 357. (b) 3 *East*, 18.

1816.

SHARMAN *against* BELL.

been hitherto considered as guiding the practice of the Court, and I should feel unwilling to open a discussion upon it, as if we doubted its propriety. The very object of selecting a practitioner at the bar as an arbitrator is, that he carries with him a supposed competency and probity; from which a confidence arises that he will come to a just decision both on the law and the fact; and the Court will abide in this confidence, unless the contrary appears on the face of the award, or it is shewn by matter *dehors* that he has decided perversely wrong. I remember that in Lord *Kenyon*'s time this was considered to be the advantage of submitting to a reference to a gentleman at the bar. The rule was acted upon in *Chace* v. *Westmore*, and is quite consistent with the decision in *Kent* v. *Elstob*; or I should rather say that that decision is a confirmation of the rule. The application to set aside the award in that case was entertained on the ground that a contemporaneous paper, containing the arbitrator's reasons for making the award, was part of the award; as to which it was observed by *Le Blanc* J. (*a*), "The paper in question was delivered, together with the award, by the arbitrator, as containing his reasons for coming to the conclusion, which he did; we must, therefore, take them to be such, as much as if they were inserted in the award itself." Here, it appears, a doubt occurred to the mind of the arbitrator, which, by his desire, was argued before him; and this, as it seems to me, so far from affording a ground for setting this award aside, is a reason for holding it conclusive; because it shews that the arbitrator, after having all the information which

(*a*) 3 *East*, 21.

he

1816.

SHARMAN *against* BELL.

he could derive from the assistance of counsel upon the doubt which presented itself to his mind, came to his judgment advisedly; and it is not pretended that there is any thing like misconduct imputable to him. If the arbitrator had raised the question upon the face of the award, the Court must have taken notice of it; the arbitrator not having done this, I presume the doubt which he at first entertained was removed, and I think we should be departing from the practice of the Court if we were now to discuss it.

BAYLEY J. I am of the same opinion. I have always considered it as a rule, that where a matter is referred to a gentleman at the bar, his award is conclusive, unless some question be raised on the face of the award, or upon some collateral instrument which is to be considered as a part of it, as in *Kent* v. *Elstob*; and I think it would be extremely inconvenient if it were otherwise.

HOLROYD J. The same point has, I believe, been decided in the Court of Chancery. (a)

Per Curiam.

Rule discharged.

(a) See *Young* v. *Walker*, *Ves. jun. N. S.* 361.

1816.

Tuesday, November 26th.

The King *against* Tucker.

An overseer of the poor is discharged by his bankruptcy and certificate from a debt due in respect of a sum of money in his hands, as overseer at the time of his bankruptcy, although this happen before the expiration of his year of office, before which time he cannot be compelled to account.

TUCKER, one of the late overseers of the poor of the parish of *Harberton*, in the county of *Devon*, was committed by two justices to the county gaol, until he should give in and verify his accounts as such overseer, and pay and yield up the monies due to the said parish. The case was this: *Tucker* and another were appointed overseers from *Lady-day* 1815, to *Lady-day* 1816, and took on them the said office; and *Tucker* received on account of the parish between *Lady-day* 1815, and the end of *January* 1816, 952*l.* 4*s.* 6*d.*, out of which he disbursed 770*l.* 15*s.* 3*d.*, leaving a balance in his hands of 181*l.* 8*s.* 10*d.* On the 6th of *February*, 1816, a commission of bankruptcy issued against him, and he was declared bankrupt, and accounted under the commission for the balance, but having before the commission, absconded from his house, the account books in his hands as overseer were taken away from his house by the churchwardens and overseer. At *Lady-day*, 1816, new overseers having been appointed, *Tucker* was summoned to attend, and did attend a vestry meeting, and there made up his accounts by checking them with the account books in the hands of the overseers; from which it appeared, that the above balance was due from him to the parish before he became bankrupt, and he offered to verify the account on oath. Afterwards he obtained his certificate, notwithstanding which, the justices issued their warrant upon the complaint of one of the overseers, that *Tucker* had not made and given in his account, and yielded

1816.

The KING *against* TUCKER.

yielded up the monies and things claimed by the parish to them, the succeeding overseers, under which warrant he was carried before the justices, and committed as above, though he represented to them what had passed, and that he had always been, and was then ready, to verify his account on oath; and that, having obtained his certificate, he was not personally liable. And upon a rule nisi for a *habeas corpus* to discharge *Tucker* out of custody as to this commitment, the doubt was, if his bankruptcy and certificate discharged the debt.

Nolan, who shewed cause, relied on *Rex* v. *Eggington* (*a*), which, however, he admitted, had not been approved of in *Ex parte Exley*. (*b*) But he argued, that an overseer is not like a mere trustee; he is indictable if he does not account and pay over the balance (*c*), though he cannot be called on to bring in his account until the year expires. (*d*) Now, at the time of the defendant's bankruptcy, there was not any debt due from him as overseer for which he could be sued, nor any one to whom he could pay it until his successors were appointed; consequently, this is not a debt proveable under the commission within the statutes of bankrupt.

But *per Curiam*. The money in his hands at the time of the bankruptcy was *debitum in præsenti*, although he might only be accountable for it *in futuro*.

(*a*) 1 *T. R.* 369. (*b*) 6 *Ves.* 811.
(*c*) *Rex* v. *King*, 2 *Str.* 1268. *Rex* v. *Commins*, 5 *Mod.* 179.
(*d*) *Rex* v. *Gibson*, *Fol.* 20.

Gifford,

1816.

The KING *against* TUCKER.

Gifford, who was in support of the rule, was not called upon by the Court; only he said, that it had been held, with respect to the land-tax collectors, that any of the parishioners might prove.

Rule absolute upon the defendant's verifying his account, and undertaking not to bring any action.

Tuesday, November 26th.

CALVERT *against* EVERARD.

After final judgment, defendant is too late to apply to the Court under the Court of Request's act, in order to deprive the plaintiff of costs.

UPON a rule nisi for setting aside the judgment, so far as related to the costs, on the ground that the debt at the time of action brought did not exceed 5*l.*, and that the defendant at the time of contracting the debt, and thence hitherto, was a resident inhabitant in *Sibsey*, within the jurisdiction of the Court of Requests for that district (*a*), in the county of *Lincoln*; it appeared that the original debt amounted to 9*l.* 11*s.* 6*d.*, but had been reduced by a payment of 5*l.* on account, and afterwards the defendant was served with a latitat at the suit of the plaintiff for the recovery of the difference. Judgment passed by default, and a writ of enquiry was executed, and final judgment signed thereon before this rule was moved for, and execution issued against the defendant's goods.

Richardson, who shewed cause, objected that the application was too late, and should have been made

(*a*) By stat. 47 *G.* 3. c. 78. it is enacted, that if any action be commenced in any other court than the said Court of Requests for any debt not exceeding 5*l.* the plaintiff shall not, by reason of a verdict for him, or otherwise, have, or be entitled to any costs.

before

1816.

CALVERT *against* EVERARD.

before final judgment. And he cited *Brampton* v. *Crabb* (a), *Dunster* v. *Day* (b), and the opinion of *Buller* J. in *Barney* v. *Tubb*. (c)

Andrews, contrà, relied on *Foott* v. *Coare*. (d)

BAYLEY J. It seems to me that this application ought to have been made before final judgment; because, regularly there should be a suggestion on the roll, which can only be made before judgment is entered.

ABBOTT J. The case cited by Mr. *Andrews* is distinguishable, for there the defendant's attorney gave the plaintiff's attorney notice, that if he entered up judgment for costs, the Court would be moved to set it aside; notwithstanding which the plaintiff's attorney signed judgment for costs.

Per Curiam.

Rule discharged.

(a) 1 *Str.* 46.
(b) 8 *East*, 259.
(c) 2 *H. Bl.* 356.
(d) 2 *B. & P.* 588.

WHEELWRIGHT *against* SIMONS, Bail of FLES.

Tuesday, November 26th.

In debt on a recognizance of bail taken in *C. B.*, where plaintiff had recovered in the original action a sum exceeding the sum sworn to, this Court staid the proceedings against the bail on payment of the debt sworn to, with interest and costs.

WHEELWRIGHT sued *Fles* in C. B., and arrested him, upon an affidavit of debt, as acceptor of a bill of exchange for 167*l.* 9*s.* 7*d.* *Simons* gave bail to the action, entering into the usual recognizance in double

the

1816.

WHEELWRIGHT *against* SIMONS.

the sum sworn to. *Wheelwright* afterwards recovered against *Fles*, upon a writ of enquiry after judgment by default, a sum beyond the amount of his acceptance, on the count for goods sold; and afterwards brought debt in this court against *Simons* upon his recognizance. Whereupon a rule nisi was obtained for staying the proceedings on payment of the debt sworn to and costs.

Campbell, who shewed cause, resisted the rule, on the ground, that, this being a recognizance of the Court of C. B., the rule of that Court must be applied to it, namely, that the bail is liable to the full extent of the penalty of the recognizance, that is, double the amount of the sum sworn to (*a*); *aliter*, if the recognizance had been in this court. (*b*)

F. Pollock, in support of the rule, said that in *Dahl* v. *Johnson* the Court of C B. seem to admit that the practice of this Court was more reasonable than their own. And he cited *Carwell* v. *Coa*[illegible]. (*c*)

And *per* Lord ELLENBOROUGH C. J. There seems to be no reason for varying our practice because this is a recognizance of the Court of C. B.

Rule absolute on payment of the amount of the bill of exchange, interest, and costs. (*d*)

(*a*) *Dahl* v. *Johnson*, 1 *Bos. & Pul.* 205.
(*b*) *Clarke* v. *Bradshaw*, 1 *East*, 90.
(*c*) 2 *Taunt.* 107. (*d*) See *Tidd's Pr.* 6th ed. 274.

1816.

The KING *against* The Justices of ESSEX.

Wednesday, November 27th.

Where corporation justices consist of a greater number than four, an appeal lies to them at sessions against a poor rate, although there be less than four who are devoid of interest in the question.

UPON a rule nisi for a *mandamus* to the justices of *Essex*, to receive an appeal against a poor's-rate for the parish of *Saffron Walden*, which the justices had refused to receive at their last *Midsummer* quarter sessions, on the ground that it ought to have been made to the justices of the town sessions, the case was thus: The limits of the town and parish of *Saffron Walden* are co-extensive. The town of *Saffron Walden* is a town corporate, and by the charter, (dated the 26th *December*, 6 *Will. & Mary*), the mayor, during his mayoralty, and for one whole year next ensuing, the recorder and the deputy recorder for the time being, and the two senior aldermen for the time being, (making together six) are constituted justices within the town and precincts thereof. The corporation of *Saffron Walden* have regularly held a court of quarter sessions from the date of their charter. The mayor is elected from among the aldermen, and the aldermen from the inhabitants of the town, and, except in the instance of the recorder and deputy recorder, the justices composing the court of quarter sessions must be resident in the parish of *Saffron Walden*. The mayor, in case of sickness or absence from the town, may appoint a deputy from among the aldermen. The appellants gave regular notice to the parish officers of their intention to appeal, and also (among others) to the mayor and recorder, as being two of the persons in respect of whom they were overrated;

1816.

The King *against* The Justices of Essex.

rated; and the other town justices, except the deputy recorder, were also rated in the said assessment.

Adams, who shewed cause, relied on stat. 43 *Eliz.* *c.* 2. *s.* 8., as giving authority to the town justices over this appeal, which authority, he said, was not abridged, either by stat. 16 *G.* 2. *c.* 18. *s.* 3., which relates only to county justices, or by 17 *G.* 2. *c.* 38. *s.* 5., which only attaches where the number of corporation justices is less than four.

Gurney, contrà, argued that 17 G. 2. *c.* 38. *s.* 5., which gives an appeal to the county sessions where there are not four justices in the corporation, must be construed as meaning four who have no interest; for otherwise it would be leaving to the parties themselves to determine their own cause, which would be contrary to first principles. And, therefore, per *Holt* C. J., the mayor of *Hereford* was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court. (*a*) So, where a justice joined in an order of removal from his own parish, the order was quashed, for this was a judicial act, and the party interested was tacitly excepted. (*b*) And so, also, an order of sessions was quashed, because it concerned one of the justices named in the style of the Court. (*c*)

The Court, thinking the case to be of general importance, desired time to look into the acts.

Cur. adv. vult.

(*a*) *Salk.* 396. (*b*) *Great Charte* and *Kennington*, *Str.* 1173.
(*c*) *Foxham Tything*, *Salk.* 607.

Lord

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

1816.

The KING *against* The Justices of ESSEX.

In the case respecting the justices of the borough of *Saffron Walden*, which was depending yesterday, the Court took time to look into the several acts of parliament, and cases referred to. Of the six corporation justices, consisting of the recorder, deputy-recorder, two senior aldermen, and two other persons, it was contended, that the last four were disqualified by law from sitting upon any appeal in any matter respecting the poor laws, as being, in respect of their inhabitancy and liability to be rated within the borough, on that account, incompetent, and that these being judicial acts, as persons interested, they were, in the language of one of the cases cited, tacitly excepted. And the case of the parishes of *Great Charte* and *Kennington*, 2 *Str*. 1173., and of *Foxham Tything*, in *Com. Wilts*, 2 *Salk*. 607., were relied on to this effect: but, upon looking into the statutes, 43 *Eliz. c.* 2., 16 *G.* 2. *c.* 18., and 17 *G.* 2. *c.* 38., we are of opinion that the justices of the borough of *Saffron Walden* are not disqualified from sitting as a court of appeal under the poor laws, on the ground of their being rated or chargeable with the rates of the place within which their jurisdiction is to be exercised. By the 43 *Eliz. c.* 2. *s.* 8., as head officers of the town corporate, they being justices of the peace, have the same authority within the limits and precincts of their jurisdiction, as is limited, prescribed, and appointed by that act to justices of the peace of the county, "and no other justices of the peace are to enter or meddle there." Being invested with the like jurisdiction, both original and appellate, on the subject of the poor laws, with justices of the county, and with the sort of *ne intromittant*

1816.

The KING *against* The Justices of ESSEX.

tromittant provision in their favour as to its exercise, which I have last stated, there occurred in *Michaelmas* term, 16 *G.* 2., the case in 2 *Str.* 1173., in which it was held that a justice could not join in removing a pauper from his own parish. This decision, in its letter, if it should continue to be acted upon as a general rule of law, would have wholly disabled the justices of a great many towns corporate from acting in the execution of the poor laws, both in an original and in an appellate character, as justices in respect to the same; and it is fair to presume, from the very nearly contemporary date of the stat. 16 *G.* 2. *c.* 18. with this decision, that this act was introduced to obviate this inconvenience; for reciting, "that doubts had arisen, whether, according to the laws and statutes then in force, his majesty's justices of the peace might lawfully act in any case relating to the parishes and places to the rates and taxes of which such justices respectively are rated or chargeable," it enacts, "That it shall and may be lawful to and for all and every justice or justices of the peace for any county, riding, city, liberty, franchise, borough, or town corporate, within their respective jurisdictions, to make, do, and execute, all and every act or acts, matter or matters, thing or things, appertaining to their office as justice or justices of the peace, so far as the same relates to the laws for the relief, maintenance, and settlement of poor persons, or to any other laws concerning parochial taxes, levies, or rates, notwithstanding any such justice or justices of the peace is or are rated to or chargeable with the taxes, levies, or rates within any such parish, township, or place affected by any such act or acts of such justice or justices as aforesaid." However, inasmuch as, from the greatness of the

1816.

The KING *against* The Justices of ESSEX.

the number of justices of the peace for counties, the attendance of any particular justice could be spared upon appeals, it provides that that act, or any thing therein contained, should not authorize or empower any justice or justices of the peace for any county or riding at large, to act in the determination of any appeal to the quarter sessions for any such county or riding, from any order, matter, or thing relating to any such parish, township, or place where such justice or justices of the peace is or are so charged, taxed, or chargeable as aforesaid; any thing therein contained to the contrary notwithstanding." Here, it will be observed, that "justices of the peace for cities, liberties, franchises, boroughs, or towns corporate," who are all included by name in the enabling clause of this statute, are not included in this prohibitory provision in the case of appeals, which prohibition is confined expressly to justices of the peace for counties and ridings at large only. The stat. 17 *G.* 2. *c.* 38. *s.* 5., probably adverting to and meaning to obviate the danger of admitting justices, under any bias or interest in the subject-matter of the appeal, to sit upon such appeals, where, from the smallness of the number of the attending justices, such bias or interest shall be likely to operate with prejudicial effect upon the administration of justice, provides, "That in all corporations and franchises, which have not four justices of the peace, it shall and may be lawful for any person or persons, in any of the cases aforesaid, where an appeal is given by this act, to appeal, if he or they shall think fit, to the next general or quarter sessions of the peace for the county, riding, or division wherein such corporation or franchise is situate:" where the corporation justices consisted of a

 larger

1816.

The KING *against* The Justices of ESSEX.

larger number of persons than four, thinking it probably unnecessary to interfere with the exclusive jurisdiction on this subject, which they derived under the 43 *Eliz. c.* 2. *s.* 8., which has already been observed upon. We are, therefore, upon a view of the provisions of the several statutes referred to on this subject, and adverting to their policy and object, of opinion that the legislature meant, in the case of borough justices, (where the whole number of them was four or more), as in the present case, to leave their jurisdiction under 43 *Eliz.* entire, not curtailed or abridged, from suspicions of possible abuse; a liberal confidence on the part of the legislature, which ought to be repaid by the most perfect impartiality and justice on the part of those to whom such a jurisdiction is, under such circumstances, entrusted.

Rule discharged.

Wednesday, November 27th.

DRAYCOTT *against* PILKINGTON.

Plaintiff cannot treat a sham plea as a nullity, and sign judgment as for want of a plea, after he has given a rule to abide by the plea.

TO debt on bond the defendant pleads a sham plea, viz. a set-off, for money due on an obligation, on a recognizance, and on simple contract. The plaintiff, after ruling the defendant to abide by his plea, signed judgment as for want of a plea. And, upon a rule for setting aside this judgment,

Marryat, who shewed cause, contended, that the plea being a sham plea, apparent upon the face of it, for it required different modes of trial, might be treated as a nullity; and that the rule given to abide by the

plea,

1816.

DRAYCOTT *against* PILKINGTON.

plea, was not a waiver of the plaintiff's right so to treat it. And *Lockhart* v. *Mackreth* (*a*), *Penfold* v. *Hawkins* (*b*), were cited.

Chitty, contrà, in support of the rule, distinguished this from *Penfold* v. *Hawkins*, because there, the action being on bond, the plea was pleaded as if to an action upon promises. At all events, the rule to abide by the plea is a waiver, being an admission by the plaintiff that it is a plea.

Lord ELLENBOROUGH C. J. The Court has no doubt that this is a sham plea; and would have had no difficulty in dealing with it, had it not been for the rule to abide by the plea. But as the plaintiff has treated it as a plea, by giving the defendant a rule to abide by it, he has precluded us, by the terms of the rule, from treating it as a nullity. I should have been glad to have so treated it, if I could.

Per Curiam, Rule absolute, without costs. (*c*)

(*a*) 5 *T. R.* 661. (*b*) 2 *M. & S.* 606.

(*c*) *Duberly* v. *Phillips*, *S. P.*, adjudged on the same day. *Gifford* for the plaintiff, *Chitty* contrà.

Thursday, November 28th.

The KING *against* GILBIE.

The costs of conveying a defendant to gaol in execution of his sentence, are reasonable costs within statute 5 & 6 *W. & M.* c. 11. s. 3. to be allowed to the prosecutor where the indictment has been removed by certiorari.

GILBIE was indicted for a misdemeanor at the *Northumberland* quarter sessions, and removed the same by *certiorari* into this Court, and was afterwards found guilty, and sentenced to two years' imprisonment in the gaol for that county; in execution of which sentence he was conveyed thither at the prosecutor's expence. The Master, on taxing the costs, allowed this expence to the prosecutor. A rule *nisi* having been obtained for the Master to review his taxation,

Scarlett and *Deacon* shewed cause, and argued, that this allowance was warranted by stat. 5 & 6 *W. & M.* c. 11. s. 3., which enacts, "That if the defendant prosecuting the certiorari be convicted of the offence for which he was indicted, the Court of King's Bench shall give *reasonable costs* to the prosecutor." And they urged, that if the indictment had been left with the sessions this expence would not have been incurred, because the defendant would have been on the spot; wherefore, it was by the defendant's own act, who removed the indictment, that the cost was incurred; and it is a part of the reasonable costs. The prosecutor, in discharge of his duty, had a right to see that the sentence of the Court was executed.

Chitty, contrà, maintained, that the statute *W. & M.* did not contemplate costs such as the present, nor, indeed, any costs after judgment. And, as to the defendant

1816.

The KING *against* GILBIE.

fendant being the occasion of this expence, the sentence might as well have been to the prison of this court as to the county gaol. The place, therefore, of imprisonment was the act of the Court. The recognizance of the defendant extends to the costs of the trial, and not of execution. And he cited *Rex* v. *Cholsey* (*a*), and *Queen* v. *Sumers*. (*b*)

Lord ELLENBOROUGH C. J. Under the terms of the recognizance the defendant was bound to pay all reasonable costs. These costs, if not immediately occasioned by the *certiorari*, were certainly incurred in consequence of it. If the indictment had remained below, no such expence would have been incurred. The defendant's own act, therefore, may be said to have occasioned the expence. It is reasonable that the defendant should bear the expence, for which no other fund is provided.

BAYLEY J. It is a part of the prosecution to carry it to its legal conclusion.

Per Curiam, Rule discharged.

(*a*) *Cowp*. 726. (*b*) *Salk*. 55.

REGULA GENERALIS.

Wednesday next after 15 days of *St. Martin*, 57 *Geo.* 3.

WHEREAS by a rule made in this court in *Trinity* term now last past, it was ordered (among other things), that the marshal of the Marshalsea of this Court present to the Judges of this Court, in their chamber at *Westminster-hall*, within the *first four* days of every term, a list of all such prisoners as are supersedeable, shewing as to what actions, and on what account they are so, and as to what actions (if any) they still remain not supersedeable. And whereas it sometimes happens that prisoners who would be supersedeable, according to the general rules and practice of the Court, may not be entitled to their supersedeas or discharge, by reason of some special matter unknown to the marshal; and it is expedient that such special matter should in all cases be made known to the marshal, in order to the better preparing the lists required by the said recited rule. Now it is hereby ordered by the Court, that if by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any prisoner, now or hereafter to be detained in the actual custody of the marshal, be not now or hereafter may not become entitled to a supersedeas or discharge to which such prisoners would, according to the general rules and practice of this Court, be otherwise entitled for want of declaring, proceeding to judgment or charg-

ing

ing in execution within the times prescribed by such general rules and practice, then and in every such case, the plaintiff or plaintiffs at whose suit such prisoner now is or hereafter may or shall be so detained in custody shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the marshal, upon pain of losing the right to detain such prisoner in custody by reason of such special matter. And the marshal shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of this court, from time to time, a list of all the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of prisoners supersedeable, as required by the said recited rule. 1816.

END OF MICHAELMAS TERM.

INDEX

TO THE

PRINCIPAL MATTERS.

at the sheriff's office, kept there for that purpose. *Hutton* v. *Beuben*, *T.* 56 *G.* 3. Page 323

4. In debt on a recognizance of bail taken in *C. B.*, where plaintiff had recovered in the original action a sum exceeding the sum sworn to, this Court staid the proceedings against the bail on payment of the debt sworn to, with interest and costs. *Wheelwright* v. *Simons, Bail of Fles.* *M.* 57 *G.* 3. 511

BANKRUPT.

See Evidence, 4. Pleading, 4. Property, 2. Set-off, 2.

1. A covenant in an indenture made between *A.* and *B.* (assigning to *A.* 4350*l.* payable under articles of agreement by *I. S.* to *B.* by instalments) that in case the said sum, or any instalment thereof, should not be paid to *A.* at the times and in the manner provided for by the articles, *B.* would, upon demand, pay to *A.* the said sum, or so much thereof as should not be paid at the times, &c., was held not to be discharged by the bankruptcy of *B.* as to any instalments accruing due after the bankruptcy: this not being a matter proveable under the commission, either by *s.* 9. or *s.* 17. of 49 *G.* 3. *c.* 149. *Hoffham* v. *Foudrinier*, *E.* 56 *G.* 3. 21
2. A creditor, being ignorant that an act of bankruptcy had been committed by his debtor, executed a composition deed for the amount of his debt, and received a dividend under it: Held, that he might, notwithstanding, become a petitioning creditor, in respect of the original debt. *Doe on the Demise of Pitcher* v. *Anderson and Another*, *T.* 56 *G.* 3. 161
3. Where one of two partners, who were country bankers, became bankrupts, and defendants, being holders of their notes, obtained payment of part of them from the *London* banker, at whose house they were payable, out of the funds in their hands belonging to the country bank, and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm, to give his bill in part satisfaction of his debt, and indorsed and delivered the same to defendants, in payment of the residue of the notes in their hands, and afterwards became bankrupt: Held, that the assignees could not recover from defendants the monies so paid to them by the *London* banker, nor the proceeds of the said bill. *D. Harvey and Others, Assignees of M. B. Harvey, and I. W. Harvey, Bankrupts*, v. *Crickett and Others*, *M.* 57 *G.* 3. Page 336
4. An overseer of the poor is discharged by his bankruptcy and certificate from a debt due in respect of a sum of money in his hands, as overseer at the time of his bankruptcy, although this happen before the expiration of his year of office, before which time he cannot be compelled to account. *Rex* v. *Tucker*, *M.* 57 *G.* 3. 508

BARREN LAND.

See Tithe.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Pleading, 3. Variance, 1. Witness.

1. A country banker, with whom a bill of exchange, payable in *London*, is deposited, has an entire day after receiving notice of its dishonour, to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough: therefore where the indorsee of a

 bill

bill payable at a banker's in *London*, deposited it with his bankers in the country, who caused it to be duly presented for payment on the 14th, when it was dishonoured, and notice sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th (being *Sunday*), and they on the next day, sent notice by the post to the indorsee, but not before twelve at noon, at which time the post set out for the place where the indorsee resided: Held that this notice was within time. *Bray and Others* v. *Hadwen*, *E.* 56 *G* 3. Page 68

2. The drawer of a bill of exchange is not discharged by the want of notice of non-acceptance, where the bill has passed into the hands of a *bonâ fide* indorsee for value, who had no knowledge of the dishonour. *Dunn and Another* v. *O'Keeffe*, *in error*, *T.* 56 *G.* 3. 282

3. An agent to a country bank, to whom plaintiff sent a sum of money, in order to procure a bill upon *London*, drew in his own name for the amount upon the firm in *London*, the two firms being the same: Held, that the agent was liable as drawer, although plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money. *Leadbitter* v. *Farrow*, *M.* 57 *G.* 3. 345

BILL OF SALE.

See Stamps, 2.

BONA NOTABILIA.

Probate in the Court of the archdeacon of *Sudbury*, to whom the bishop granted full power to prove the wills of all persons deceased, within the archdeaconry, was held good, the testator having died within the said archdeaconry; although he was possessed of a term of years in lands lying within another archdeaconry in the same diocese. *Rex* v. *W. Yonge*, *D. D.* *E.* 56 *G.* 3. Page 119

BOROUGH.

See Justices.

CHURCH RATE.

Under 53 *G.* 3. *c.* 127. *s.* 7. a party summoned before two justices for non-payment of a church-rate, may give them notice that he disputes the validity of the rate, or his liability to pay the same, although no proceeding is commenced in the Ecclesiastical Court; and where a party so summoned, told the justices that he would bring an action against any person who ventured to levy the rate, as he thought he had no right to pay, because he had no claim to or seat in the chapel: Held that this was sufficient notice. *Rex* v. *The Chapel-wardens of Milnrow*, *T.* 56 *G.* 3. 248

COMPOSITION.

See Bankrupt, 2.

CONDITION.

The condition of a bond, which recited the purchase from *W.* by plaintiffs of lands, was to save them and the lands harmless from all manner of mortgages, judgments, extents, executions, and other incumbrances, had and obtained, or thereafter to be had and obtained, by *T. T.* or any other person; and it was held to bind the obligor against the wrongful entry of *T. T.*, being particular against the acts of a particular person. *Nash and Another* v. *Palmer*, *M.* 57 *G.* 3. 374

CON-

CONVICTION.

Two justices may proceed under 12 *G.* 3. *c.* 61. *s.* 18. to adjudge a forfeiture of gun-powder unlawfully conveyed to the person seizing the same; but the conviction must shew that the person to whom it is adjudged is the person who seized, its being adjudged to *T. G.*, the person who seized the same, without more, is insufficient. *Rex* v. *Thomas Smith*, *E.* 56 *G.* 3. Page 133

2. Upon a conviction under statute 5 *Ann. c.* 14. *s.* 2. against a carrier for having game in his possession, it is sufficient if in the information and adjudication, the qualifications mentioned in statute 22 and 23 *Car.* 2. *c.* 25. *s.* 3. be negatived, without negativing them in the evidence. *Rex* v. *Turner*, *T.* 56 *G.* 3. 206

3. A conviction by two justices under statute 17 *G.* 2. *c.* 38. upon complaint of the overseers of a parish against the late overseer, for refusing and neglecting to deliver over to them a certain book belonging to the parish called the Bastardy Ledger, convicting him of the said offence, and adjudging that he should be committed to the common gaol, to be safely kept until he should have yielded up all and every the books concerning his said office of overseer belonging to the parish, was held void, as to the adjudication respecting the imprisonment, for excess, the same extending beyond what was previously required of the person convicted; and a warrant of commitment, founded on this conviction, and directing the gaoler to keep him in the terms of the adjudication, was also holden void in toto, for which trespass and false imprisonment would lie against the justices, although the conviction had not been quashed. *Groome* v. *Forrester*, *D. D. and Another*, *T.* 56 *G.* 3. Page 314

COPYHOLD.

See SURRENDER.

CORONER.

See PRACTICE, 1.

COSTS.

See PRACTICE, 2.

1. Compensation for loss of time disallowed to two merchants coming from abroad as witnesses. *Moor* v. *Adam*, *E.* 56 *G.* 3. 156
2. The Court will not compel a foreign ambassador to give security for costs. *The Duke de Montellano* v. *Christin*, *M.* 57 *G.* 3. 503
3. After final judgment, defendant is too late to apply to the Court under the court of request's act, in order to deprive the plaintiff of costs. *Calvert* v. *Everard*, *M.* 57 *G.* 3. 510
4. The costs of conveying a defendant to gaol in execution of his sentence, are reasonable costs within statute 5 & 6 *W. & M. c.* 11. *s.* 3. to be allowed to the prosecutor where the indictment has been removed by certiorari. *Rex* v. *Gilbie*, *M.* 57 *G.* 3. 520

COVENANT.

See CONDITION.

Where *I. B.*, being seised in fee, conveyed to defendant and *T. J.* their heirs and assigns, to the use that *I. B.* his heirs and assigns, might have and take to his use a rent certain to be issuing out of the premises, and subject to the said rent, to the use of defendant, his heirs and assigns, and defendant covenanted with *I. B.*, his heirs

 and

and assigns, to pay to him, his heirs and assigns, the said rent, and to build within one year, one or more messuages on the premises for better securing the said rent, and *I. B.* within one year demised the said rent to plaintiffs for 1000 years: Held, that covenant would not lie for the plaintiffs for nonpayment of the rent, or for not building of the messuages, for the covenant was personal to *I. B.* *Milnes and Others* v. *Branch*, *M.* 57 *G.* 3. Page 411

DESCENT.

See Devise, 1.

DEVISE.

1. Devise of his estates to his wife for life, and after her decease to his son (his heir at law) charged with the yearly payment of 100*l.* to his daughter for her life, and at her decease with the sum of 1500*l.* to be divided among her children; or if no child, to be disposed of as she should direct; and in default of payment of either of the said sums within the time appointed, to *G. T.*, his heirs, administrators, and assigns, in trust, to raise the 100*l.* out of the rents and profits, and the 1500*l.* by sale or mortgage of a sufficient part of the lands, and subject to the said charges and trust to his said son, his heirs, executors, administrators, and assigns: Held, the son took by descent and not by purchase. *Chaplin, Clerk,* v. *Leroux, E.* 56 *G.* 3. 14

2. Devise to *W.* one of the sons of my sister *A. W.*, before marriage for his natural life, and from and after his decease to the heirs of the body of *W.* lawfully issuing, in such shares as *W.*, by deed or will, shall appoint, and for want of such appointment, to the heirs of the body of *W.* lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such child; and for want of such issue, to my right heirs for ever: Held, that *W.* and his children, who were born after the death of testator, took only estates for life. *Doe dem. Wright and Others,* v. *Jesson and Others, E.* 56 *G.* 3. Page 95

3. "Devise of the interest of all my land property, whether houses, bank-stock, or cash, after discharging my debts, to my wife; and after her demise to my brother *W.* for life, but not to cut, fall, or destroy any thing of the estate; and after his decease into my sister *C.*'s family, to go in heirship for ever:" Held, that the real estate passed in entirety to the eldest son and heir of *C.* in fee. *Doe dem. Chattaway* v. *Smith and Wife, E.* 56 *G.*3. 126

4. Where testatrix being seised in fee of an undivided fifth part, and of a moiety of another undivided fifth part, devised "my share of the Bastile and other estates, situate at *C.*, and now in the occupations of *T.* and *C.* to my sister, *C. W.*," this was held to pass a fee. *The Rev. Samuel Paris, Clerk, Thomas Arnold, Ann Watts, Widow, Elizabeth Watts, and Henry Watts,* Plaintiffs; *and George Miller, William Deeming, and Caroline, his wife,* Defendants, *M.* 57 *G.* 3. 408

5. Devise to *I. N.*, his heirs, and assigns for ever, and if *I. N.* shall happen to die without any issue of his body, lawfully begotten on the body of his present wife, or of any subsequent wife or wives, the lands, &c., afore given to *I. N.*, and his heirs after the death of *I. N.*, and his wife or wives aforesaid, shall go and remain to all the children of *M. D.*, share and share alike, to hold as tenants in common: Held,

Held, that *I. N.* having died without issue in the lifetime of the testatrix, leaving a widow who survived testatrix, the remainder to the children of *M. D.*, which would have been a contingent remainder if *I. N.* had survived testatrix, might take effect as an executory devise, so as to preserve the limitation to the children of *M. D.*, and that the children of *M. D.*, living at the death of testatrix, together with an afterborn child, took an estate for life in equal shares, at the death of the widow of *I. N.*, and that the shares of such of the children as died after testatrix, and before the widow of *I. N.*, did not pass to the survivors, but went to the heir at law of testatrix. *Doe dem. Scott and Others* v. *Roach and Others, M.* 57 *G.* 3. Page 482

6. Devise to the use of trustees in fee, in trust (after payment of debts) to receive the rents for the benefit of her brother *M. S.*, his wife and children, all or any of them, during his life, as they should think proper, and after his decease, in trust for her nephew, &c.: Held, that *M. S.*, who, after the death of testatrix, by permission of the trustees, occupied until his death, a cottage in the township where the lands devised were situate, did not acquire a settlement thereby, the rents and profits of said lands having been insufficient to pay testatrix's debts; and *M. S.*, at the testatrix's decease, and from that time until his own decease, being an uncertificated bankrupt. *Rex* v. *The Inhabitants of Darlington, M.* 57 *G.* 3. 493

DISTRESS.

See Fraudulent Removal.

The statute 11 *G.* 2. *c.* 19. empowering landlords to follow goods fraudulently and clandestinely carried off the premises within 30 days, applies to the goods of the tenant only, and not those of a stranger; wherefore a plea justifying the following goods off the premises, and distraining them for rent arrear, must shew that they were the tenant's goods. *Thornton* v. *Adams and Others, E.* 56 *G.* 3. Page 38

DOCKAGE RATE.

By the *Liverpool* dock act, 51 *G.* 3. *c.* 143. (Local and Personal) a ship which cleared outwards from that port to *St. Domingo*, where she discharged her cargo, reloaded for *London*, and there discharged that cargo, loaded again for *Liverpool*, and arrived there with the last mentioned cargo, was held liable to pay a dockage rate according to the rate payable from *London* only, and not from *St. Domingo*. *The Trustees of the Liverpool Docks* v. *Gladstone and Another, M.* 57 *G* 3. 328

EJECTMENT.

See Practice, 6.

EVIDENCE.

See Power, 2. Quo Warranto Variance.

1. A judgment in ejectment upon the several demises of two, was held to be evidence to support trespass quare claus. freg. brought by them jointly. *Chamier and Plestow* v. *Clingo and Willett, E.* 56 *G.* 3. 64
2. Proof of the acknowledgment of one item of debt only, is good to support a count upon an account stated. *Highmore* v. *Primrose, E.* 56 *G.* 3. 65
3. Entries in the minute book of the Quarter Sessions for *London*, that *I. T.* was a prisoner (on a day certain) for debt in the Fleet Prison, and was discharged, and that *C.* was chosen assignee of his estate,

plete as between them and defendant, by the delivery on board the ship. *Groning and Another* v. *Mendham, T.* 56 *G.* 3. Page 189

INDICTMENT.

See PLEADING, 2.

INSURANCE.

See LICENSE. SET-OFF, 1.

. A policy on freight, at and from the ship's port of loading at *J.* to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading, as aforesaid, *with leave to discharge, exchange, and take on board goods, at any port she may call at,* without being deemed a deviation, covers the freight of goods loaded at an intermediate port; and therefore where the ship having sailed with a cargo loaded at *J.*, was during the voyage cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge, and earned freight; Held that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with them as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expences attendant upon procuring the said freight. *Barclay* v. *Stirling and Another, E.* 56 *G.* 3. 6

. A loss of voyage for the season by perils of the sea, is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, &c. where the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding in the voyage.

The assured are bound to give notice of abandonment at the earliest opportunity; notice given five days after they received intelligence of the loss, was held too late.

If one of several jointly interested in a cargo, effects an insurance for the benefit of all, he may give notice of abandonment for all. *Hunt and Others* v. *The Royal Exchange Assurance, E.* 56 *G.* 3. Page 47

3. An abandonment to the underwriter on ship transfers the freight subsequently earned as incident to the ship. Therefore, where ship and freight were insured by separate sets of underwriters, and the ship being a general ship, was captured, and ship and freight were abandoned to the respective underwriters, who paid each a total loss; and the ship being re-captured, performed her voyage and earned freight; which was received by the defendant for the use of those who were legally entitled thereto: Held, that the underwriter on ship was entitled to recover. *Case* v. *Davidson and Others, E.* 56 *G.* 3. 79

4. Policy on goods at and from *Stockholm* to *Swinemunde;* and the ship being driven into *Wisby*, on 30th *May*, and detained there till the 9th *October*, the assured, on 1st *July*, wrote to their agents in *London*, "that the captain had been ordered to proceed to *Konigsberg*, as they were not certain whether the enemy might be at *Swinemunde* or not, and that the passage to *Konigsberg* was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters," which letter the agents receiving on the 12th *July*, applied to the underwriters for their consent to alter the policy, by adding the words "*Konigsberg* or

or *Memel*," after "*Swinemunde*," which consent was obtained; and the ship and goods were afterwards lost in their voyage to *Konigsberg*: Held, that this alteration did not require a new stamp, being within 35 *G.* 3. *c.* 63. *s.* 13. *Ramstrom and Another* v. *Bell*, *T.* 56 *G.* 3. Page 267

5. Insurance on a ship from *Rio-de-Janeiro* to *Liverpool*, and the ship was captured, and afterwards re-captured, but in the interval, the assured having received intelligence of the capture, gave notice of abandonment, and after the re-capture, the ship arrived at *Liverpool*, having sustained a partial damage, and action brought to recover a total loss: Held, that the assured could only recover for a partial loss. *Brotherston and Another* v. *Barber*, *M.* 57 *G.* 3. 418

6. Upon a policy of insurance on goods, where the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expences of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of the expenses: Held, that the underwriter was not answerable for this loss. *Powell and Another* v. *Gudgeon*, *M.* 57 *G.* 3. 431

7. Insurance at and from *Quebec* to *Teneriffe* on a cargo of wheat, fish, and staves, with the usual memorandum as to corn and fish free from average, unless general; and the ship was captured, and afterwards re-captured, and sent by the re-captors to *Bermuda*, where a scarcity prevailing an embargo was laid on the export of provisions, and the cargo being landed, it was found that 583 bushels of wheat were so damaged by sea water, that they were, by order of the magistrates, for the sake of the public health, thrown overboard; and other part of the wheat being damaged, the captain sold that part and the fish, which sold at a profit; and put up the ship to sale, which he purchased at not more than one fourth of its value, for the benefit of the owners; and having repaired her, and being refused permission to ship the remaining wheat to *Teneriffe*, he directed it to be sold, and purchased it for the benefit of those concerned; and by leave of the governor, the embargo being then raised as to the *West India* islands, shipped the same for *Madeira*, where he arrived and delivered it; and took in a cargo of wine for *London*, with which he arrived: Held, that the assured, who had abandoned upon receiving intelligence of the circumstances which happened previously to the time of the ship's being permitted to proceed to *Madeira*, were intitled to recover as for a total loss on the whole of the goods insured. *Cologan and Another* v. *The Governor and Company of the London Assurance*, *M.* 57 *G.* 3. Page 447

8. On a policy of insurance on goods in the common form, where the ship and goods were sunk at sea by another ship's firing upon her, mistaking her for an enemy: Held, that the insured was entitled to recover upon a special count, stating the particular circumstances; for this was within the general words of the policy, "all other perils, losses," &c. Semble, that such a loss is not a peril of the sea. *Cullen* v. *Butler*, *M.* 57 *G.* 3. 461

JUSTICES.

See Church Rate. Conviction.

1. The justices of the borough of Liverpool have authority to sentence, and to commit in execution of

of such sentence, to the house of correction for the county of *Lancaster*, an offender convicted before them, at the borough sessions, of petit larceny. *The King* v. *Houghton*, *T.* 56 *G.* 3. Page 300

2. The justices of the borough of *Liverpool* have no authority to commit to the house of correction for the county of *Lancaster*, a person convicted by them under 51 *G.* 3. *c.* 143. (local and personal) of being a rogue and vagabond within the meaning of the 17 *G.* 2. *c.* 5. *The King* v. *Houghton*, *T.* 56 *G.* 3. 311

LEASE.

See Surrender.

LICENSE.

1. A license to *C.* and *H.* (who were ship brokers in *London*) on behalf of themselves and *British* or neutral merchants, to load and export a cargo on board the *Russian* ship *Fortuna* from *London*, to any port in the *Baltic* not under blockade, was held to protect *Russian* property exported from this country on a voyage to a *Russian* port, *Russia* being at war with *Great Britain*. *Rucker and Others* v. *Ansley*, *E.* 56 *G.* 3. 25

2. Where a license was obtained and insurance effected from *Riga* to *Hull*, on goods the produce of *Russia*, on board a *Swedish* ship, but the ship sailed three days before the letter directing the license to be obtained reached the agent, the letter having been delayed by contrary winds beyond the usual time, and the license was obtained two days afterwards, and the insurance effected subsequently to that: Held that though the voyage was in its inception illegal, being contrary to 12 Car. 2. c. 18. s. 8.; nevertheless the assured might recover back the premium. *Hentig and Another* v. *Staniforth*, *E.* 56 *G.* 3. Page 122

LIEN.

A workman having bestowed his labour upon a chattel in consideration of a price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid; and this, though the chattel be delivered to the workman in different parcels, and at different times, if the work to be done under the agreement be entire. Semble, that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of the contract. *Chase and Others, Assignees of William and Thomas Hurst, Bankrupts*, v. *James and David Westmore*, *T.* 56 *G.* 3. 180

LIMITATIONS, STATUTE OF.

Where upon demand made of payment of seamen's wages accrued during the *Russian* embargo, the defendant answered, "that he would not pay; there were none paid, and he did not mean to pay unless obliged:" this was held sufficient to take the case out of the stat. of limitations. *Dowthwaite* v. *Tibbut*, *E.* 56 *G.* 3. 75

NEGLIGENCE.

The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care: therefore, where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the

trigger

trigger, when the gun went off: Held that the defendant was liable to damages in an action upon the case. *Dixon* v. *Bell*, *T.* 56 *G.* 3. Page 198

NOTICE.

See Bills of Exchange, 1, 2. Insurance, 2.

ORDER OF REMOVAL.

An order of removal made upon complaint that *M. S.* the wife of *W. S.* who is absent from her, is come to inhabit, &c., and is now with child, which is likely to be born a bastard, adjudging the said *M. S.* to be actually chargeable, was held sufficient in form, although the complaint did not state that the pauper was actually chargeable. *Rex* v. *The Inhabitants of Inskip with Sowerby*. *T.* 56 *G.* 3. 299

OVERSEER.

See Bankrupt, 4. Conviction, 3.

PARTNER.

See Bankrupt, 3.

PENAL ACTION.

See Venue.

PERILS OF THE SEA.

See Insurance, 6. 8.

PLEADING.

See Distress. Insurance, 8. Set Off.

1. *B.* cannot, in an action brought against him by *A.*, set off a judgment recovered by him against *A.* for which *A.* is charged in execution. *Taylor* v. *Waters*, *E.* 56 *G.* 3. 103
2. Indictment against a parish for non repair of a highway lying within it; plea that the inhabitants of another parish *have repaired, and been used and accustomed to repair, and of right ought to have* [illegible] Held ill, for the plea ought [illegible] shewn a consideration. *Rex* v. *The Inhabitants of the Parish of St. Giles, Cambridge*, *T.* 56 *G.* 3. Page 260
3. In declaring against the acceptor of a bill of exchange, accepted *payable at a particular place*: Held, not necessary to aver a presentment at the place. *Young* v. *Rowe*, *T.* 56 *G.* 3. 291
4. Counts for money lent and for money paid by plaintiff, as assignee of a bankrupt, were joined with counts for money had and received to plaintiff's use, and upon an account stated with him, as assignee: Held, upon error after verdict, that these counts were well joined. *Richardson* v. *Griffin in Error*, *T.* 56 *G.* 3. 294

POOR RATE.

1. Where a rate was imposed upon *P.*, owner of the lead ore in certain lead mines, in respect of the duty-lead reserved in a lease of said mines, being one-fifth share of the lead to be smelted from the ore raised from said mines: Held that this reservation was in the nature of a rent, and therefore not rateable. *Rex* v. *The Earl of Pomfret and Others*, *E.* 56 *G.* 3. 139
2. The lessee of market tolls in gross, not incident to the soil, is not rateable to the poor in respect of his occupancy thereof. *Rex* v. *Bell*, *T.* 56 *G.* 3. 221
3. The *Hull* Dock Company were held rateable in respect of the tonnage duties received by virtue of statute 14 *G.* 3. *c.* 56. although it appeared that the expenditure in repairs

repairs during the period for which the rate was made, exceeded the amount of the duties received. *Rex* v. *The Hull Dock Company*, *M.* 57 *G.* 3. Page 394

POWER.

1. Under a power to tenant for life to lease for 99 years, determinable on one, two, or three lives, a lease for 99 years, if *E. H.* should so long live, to commence from the death of *I. L.* and *M. R.* (two lives on which a subsisting lease for years was determinable) was held ill. *Doe dem. Copleston and Others* v. *Hiern and Another*, *E.* 56 *G.* 3. 40
2. Under a power given by a marriage settlement to tenant for life, to lease for years, determinable on three lives, reserving the ancient and accustomed rents, duties, &c. so as "there be contained in every such lease a power of re-entry for non payment of the rent thereby to be reserved," a lease for 99 years, determinable on three lives, with a proviso for re-entry, "if the rent should be behind or unpaid in part, or in all by the space of fifteen days next after the day of payment, and no sufficient distress could be had on the premises," was held to be a valid execution of the power; and that evidence, that the usual form of leases of the estate in settlement for years, determinable on three lives, as well prior to as after the settlement, was, with a similar conditional proviso for re-entry, was admissible evidence, the tenant for life having under the power a discretion as to the terms of the proviso, which the power required generally to be inserted in such lease. *Doe dem. The Earl of Jersey and Others* v. *Smith*, *M.* 57 *G.* 3. 467

PRACTICE.

See Costs, Suggestion of Breaches.

1. Testatum capias directed to the coroner, where one of the two sheriffs of *Bristol* was party to the suit, held irregular; for it ought to have gone to the other. *Letsom* v. *Bickley and Others*, *E.* 56 *G.* 3. Page 144
2. The defendants pleading a tender to an action for goods sold, does not preclude him from entering a suggestion on the roll, to deprive the plaintiff of his costs under statute 39 and 40 *G.* 3. *c.* 104. *s.* 12. (*London* Court of Requests act.) *Jordan* v. *Strong*, *T.* 56 *G.* 3. 196
3. Upon process by original writ against a member of parliament, the summons omitted to describe him as having privilege of parliament, and the notice at the foot stated, that in default of his appearance on the return day of the writ, plaintiffs would cause an appearance to be entered for him: Held, that the summons was sufficient. *Everett & Others* v. *J. Wharton, Esq.*, *T.* 56 *G.* 3. 321
4. A defendant who is sued by bill as an attorney, not being such, may set aside the proceedings as irregular. *Nabb* v. *Smith*, *T.* 56 *G.* 3. 324
5. New trial refused after a verdict of not guilty upon an indictment for not repairing a road, where the verdict does not bind the right. *Rex* v. *The Inhabitants of Burbon*, *M.* 57 *G.* 3. 392
6. In ejectment, proof of service of the declaration on the tenant in possession is sufficient, without producing the landlord's rule to prove that the defendant comes in as landlord. *Doe dem. Giles* v. *Warwick*, *M.* 57 *G.* 3. 393

7. Plain-

before they knew of her loss, and the licence was made to relate to a time antecedent to the loss. *Cowie and Others* v. *Barber, E.* 55 *G.* 3. Page 16

PRIVILEGE.

An attorney sued by *bill* jointly with a person having privilege of parliament does not lose his privilege. *Ramsbottom and Others* v. *Harcourt and Bawden, H.* 56 *G.* 3. 585

PRIZE-MONEY.

1. The King's warrant of the 26th of *June* 1800, for the distribution of prize taken in the expedition to the *Texel*, did not intend to authorize the two commanders in chief, and the flag and general officers, or such of them as could conveniently be assembled, to determine or to refer to the determination of others, the right of a flag officer claiming his share of the distribution, as being the naval commander in chief at the time of the capture. *Lord Viscount Duncan, Executor of Lord Viscount Duncan, deceased,* v. *Mitchell, Administrator of Sir A. Mitchell, deceased, E.* 55 *G.* 3. 105
2. Where an admiral, appointed to the command of an expedition from this country was instructed to put himself and his fleet under the command of the admiral commanding the station, if his co-operation should be necessary, and did accordingly put himself and his fleet under such command, and was directed by the admiral of the station, whilst he remained with him to consider himself under his command, and to attend to all orders and signals whilst the fleets were on the same station, and the admiral of the station did several acts forwarding the objects of the expedition, and issued orders relating thereto, but in consequence of ill health left the station with the ships under his command, and sailed for *England*, and at the time when the enemy's fleet agreed to surrender was out of sight, and not in a situation to have afforded the least assistance, and the enemy's fleet surrendered the day after he sailed: Held that the admiral of the station was not entitled to his share of distribution of prize as commander-in-chief of the expedition at the time of the capture, but that the admiral appointed to the command of it was. *Ib.* Page 105

PROCLAMATION,

See Evidence, 4.

PROMISSORY NOTES,

See Variance, 2.

A note promising to pay *J. F.* or order a sum certain, the amount of the purchase-money of a quantity of fir belonging to *H.*, with an indorsement thereon at the time of making the note, that it was given on condition that it should be void if any dispute should arise between *H.* and *W.* respecting the fir, was held not to be a promissory note within stat. 3 & 4 *Ann.* c. 9. *Hartley* v. *Wilkinson and Another, E.* 55 *G.* 3. 25

PROMOTIONS, 449, 450.

QUO WARRANTO.

Upon an application for a quo warranto information, suggesting that the defendants were elected contrary to the provisions of a particular charter.

charter, the affidavit must state that the charter was accepted, or that the usage has been in conformity to the charter; and the Court, after determining that the affidavit was ill for omitting so to state, refused leave to amend it. *The King* v. *Barzey and Others*, *T.* 55 *G.* 3. Page 253

RELEASE.

1. The lessor of the plaintiff in ejectment, cannot release the action. *Doe, dem. Byne and Others*, v. *Brewer and Another*, *T.* 55. *G.* 3. 300

2. A release contained in a deed, which recited that defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take of defendant 15*s.* in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said 15*s.* in the pound paid to them before executing the release, each and every of them did release defendant from all manner of actions, debts, claims, and demands in law and equity, which they or any or either had against him, *or thereafter could, should, or might have*, by reason of any thing from the beginning of the world to the date of release, was held to release nothing but the respective debts, and all actions and demands touching them; for the general words of release have reference to the particular recital, and shall be governed by it.

Therefore where to debt brought by plaintiffs on defendant's bond, the defendant pleaded this release, held that plaintiffs, in their replication, might plead that the bond was given by the defendant with others as a security for the repayment of bills drawn upon them by the defendant, and for monies advanced to him, and that the sum set against their names in the release was due to them from the defendant on the day of the release on his own account, and the monies intended to be secured by the bond, although part was due at the time of executing the release, were not, nor was any part included or meant by them or by defendant to be included in the sum set against their names or in the release. *Paylor and Others* v. *Homersham*, *M.* 56 *G.* 3. Page 423

RELIEF, ORDER FOR,

See Appeal.

REMOVAL, ORDER OF,

See Justices. Settlement by Hiring and Service, 1.

RENT,

See Poor-Rate, 1.

REPLEVIN BOND

See Debt, 2.

RETURN OF PREMIUM,

See Premium, Return of.

REVOCATION.

See Devise, 1.—Will, 1.

SALE OF GOODS,

See Frauds, Statute of.

SALVAGE.

1. Where a ship was chartered upon a voyage out and home, at 2[illegible]*s.* *per* ton, register measurement, *per* month, 2500*l.* to be paid on clearing outwards, the like sum at the end of twelve months, and the remainder three months after being reported at the custom-house on

her return; and the ship delivered her outward cargo, and sailed with her homeward cargo, and was captured and recaptured on the homeward voyage, and the ship and cargo were sold by consent of all parties, the owner and charterers having respectively made claim in the Admiralty Court to ship and goods, where restitution was decreed to them upon payment of salvage: Held that the charterers (having paid the two sums of 250*l.*) were not liable to contribute to the ship-owner for salvage in respect of their goods, where the proceeds of the goods fell short of the sum due for the residue of the freight, but that the ship-owner in respect of the freight was liable to the whole salvage; and the charterers having paid such contribution out of the proceeds of the goods, under a security given by them for payment of the salvage, with the assent of the ship-owner as far as his liability was concerned; held that they might set it off in an action of covenant by the owner for the residue of the freight. *Cox and Others, Assignees of Swan and Anderson, Bankrupts,* v. *May and Others, E.* 55 *G.* 3. Page 151

2. *Secus* as to the charges of establishing the claim to the cargo, and procuring the decree of restitution, for held that the charterers alone were liable to them. *ib.*

SCIRE FACIAS.

In scire facias to have execution for damages and costs *recovered against* J. B. upon a recognizance of bail, conditioned *in case the said* J. B. *and* G. K. *should be condemned* that *J. B.* and *G. K.* should pay, &c. or render themselves, the plaintiffs allege *that* J. B. *and* G. K. *have not paid, &c. or rendered themselves,* according to the form and effect of the recognizance: Held on special demurrer that the breach was ill assigned; for *non constat* but that *J. H.* who was condemned, has paid or rendered. *Wilkinson and Others* v. *Thorley and Another, E.* 55 *G.* 3. Page 38

SENTENCE,

See Sessions.

SERVANT,

See Trover.

SESSIONS,

See Costs, 2.

An indictment lies to the quarter sessions for lighting fires on the coast contrary to stat. 47 *G.* 3. *sess.* 2. *c.* 96., and if it be removed and the defendant be tried and convicted before a Judge at *Nisi Prius*, this Court shall award sentence. *The King* v. *Cock, E.* 55 *G.* 3. 71

SETTLEMENT,

See Justices.

SETTLEMENT — *by Apprenticeship,*

See Evidence, 1. Witness, 1.

A parish-apprentice was, before the passing of stat. 18 *G.* 3. *c.* 47., bound till 24, and served till nearly attaining 21, when his master being about to leave the parish, and no longer wanting his service, told him that he might leave him and go where he liked, and shift for himself, but if he could not provide for himself, he might return to him; upon which he quitted, and when he was about four months past 21 bound himself by indenture as apprentice to another master for three years, and served with him the three years: Held that he did not acquire a settlement by ser-

vice under the second indenture. *The King* v. *The Inhabitants of Bow, otherwise Nymett Tracey, M. 56 G. 3.* Page 383

SETTLEMENT—*by Hiring and Service.*

1. An order for the removal of a married woman (not stating her to be such) and her children to Y. adjudging that the lawful settlement of her and her children is in Y., was held well without adjudging that Y. was her husband's settlement; and proof by the mother of the husband that he gained a settlement in Y. by hiring and servied was held sufficient without calling the husband, although it appeared that he was in this country. *The King* v. *Inhabitants of Yspytty, E. 55 G. 3.* 52
2. A hiring at 8*s.* per week, *and two guineas for the harvest* to do any thing the gardener should set him about, is not a yearly hiring. *The King* v. *Inhabitants of Lambeth, T. 55 G. 3.* 315

SETTLEMENT—*by a Tenement of* 10l. *a-Year.*

1. Where a person rented and resided on a tenement of 4*l.* a-year, and in the same year bought at a public auction, on 12th *August*, four lots of oats growing in one field, for 12*l.* 14*s.*, which oats were of different kinds, that ripened at different periods, and he began to reap them on 14th *September*, and continued reaping them as they ripened, and carted them away at intervals between the 14th *September* and the 3d *November*, on which day he carted off the last load: Held that he did not thereby acquire a settlement. *The King* v. *The Inhabitants of Bowes. T. 55 G. 3.* 210
2. Where part—'s husband being a soldier, des and left his family in the parish of *S.*, and the wife during his absence, took a house at 5*l.* a-year in *S.*, and lived in it with her family, and also took another house at five guineas a-year, and put some of her husband's furniture in it, intending to remove thither, but never did remove, but underlet it; and during the time she held both, her husband came to see her, and remained seven weeks concealed in the house where she lived, and was made acquainted with her having taken the two: Held that the husband did not acquire a settlement by this residence. *The King* v. *The Inhabitants of Ashton-under-Lyne, M. 56 G. 3.* Page 357
3. The taking a grant of a licence from the lord of a manor to erect a cottage on a piece of land, rendering an annual rent of 10*s.* 6*d.* as a quit-rent, and also a grant of a licence to inclose a piece of ground for a garden to the said cottage, both being parts of the waste, and building a cottage thereon, and residing in it a year and a half, were held not to confer a settlement; this being a licence only, and not a grant of any interest in land. *The King* v. *The Inhabitants of Horndon-on-the-Hill, H. 56 G. 3.* 562

SHERIFF,

See ESCAPE.

Where the sheriff levied under a fi. fa., and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff: Held that the stat. 43 *G.* 3. *c.* 46. does not take away his remedy by action of debt against the plaintiff for his poundage. *Rawstorne* v. *Wilkinson, T.* 55 *G.* 3. 256

SHIP,

TITHES.

Oak wood of more than 20 years' standing, not growing from acorns, but from old stools, which stools belonged originally to trees which had stood more than 20 years, were held not to be so clearly entitled by stat. 45 *Ed.* 3. c. 3. to exemption from tithe, as to make a verdict which subjected them to tithe a wrong verdict. *Ford, Widow, and Another Executors of H. Ford, Clerk,* v. *Racster, E.* 55 *G.* 3. Page 130

TRANSPORT,

See Charterparty.

TRIAL,

See Jury.

TROVER.

A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master. *Stephens and Others, Assignees,* v. *Elwall, T.* 55 *G.* 3. 259

TRUSTEES,

See Action in the Case.

USURY.

Whether a commission of one-half per cent. upon a banking account be usurious or not, is a question for the jury, depending upon whether it may be ascribed to a reasonable remuneration for trouble and expence, or whether it be a colour for the payment of interest above 5*l.* per cent. upon a loan of money, and if there be a contrariety of evidence upon that point, the Court will not set aside the verdict and grant a new trial, although the verdict be against the opinion and direction of the Judge who tried it; unless it appears clearly that the jury have drawn an erroneous conclusion. *Carstairs and Others, Assignees of Kensington and Others, Bankrupts,* v. *Stein and Others, T.* 55 *G.* 3. Page 192

VARIANCE,

See Bills of Exchange, 1. 6.

1. Where plaintiff declared in covenant, that defendant demised to him a wharf and *storehouses*, &c., the word in the deed being *storehouse:* it was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only upon a covenant by defendant, not to suffer a wharf to be erected on his estate to the injury of the said wharf, *per quod* plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, store-room, &c. *Hoar* v. *Mill, H.* 56 *G.* 3. 470
2. In debt on a mortgage-deed for non-payment of the mortgage-money, plaintiff declared that defendant bound himself, *his heirs*, executors, and administrators, and proved a deed in which defendant bound himself, his executors and administrators only. Held that this was not a material variance. *Hamborough* v. *Wilkie, H.* 55 *G.* 3. 471 *n.*
3. Where the indorsee declared against the maker of a promissory note, *that he made the same payable at the house of Messrs.* B. *and Co., London,* and upon production of the note at the trial it appeared that the address at the house of Messrs. *B.* and Co. was not a part of the note, but only a memorandum at the foot of the note. Held that this was a variance. *Exon* v. *Russell, H.* 56 *G.* 3. 505

VENUE.

stated that the pauper let himself by the week, it being also stated, that at the time the pauper let himself by the week, nothing passed between him and his master as to his being hired by the week, except that he was to have weekly wages. *Rex* v. *The Inhabitants of Great Yarmouth*, *E.* 56 *G.* 3. Page 114

2. Where a pauper, at the time of hiring himself, had a daughter of the age of eighteen, who from the age of four had lived with her grandfather, and had been maintained by him until his death, and afterwards by her grandmother, which continued until she attained twenty-one, the grandfather having by his will directed the grandmother to educate and maintain her out of a fund given to the grandmother for life, and after her decease to the daughter: Held, that the daughter was not emancipated, and consequently pauper was not within statute 3 and 4 *W.* & *M.* a person not having a child at the time of the hiring. *Rex* v. *The Inhabitants of Uckfield*, *T.* 56 *G.* 3. 214

SETTLEMENT BY A TENEMENT OF TEN POUND A YEAR.

1. Where pauper, by order of a corporation, made at a common hall, was allowed the liberty to take sand and gravel from the bed of a river, (of which the corporation were entitled to the soil,) with a condition that he sold the sand to the inhabitants of the town at a certain rate; for which liberty he paid to the corporation at the rate of 10*l.* per ann.: Held, that he thereby acquired a settlement. *Rex* v. *The Inhabitants of All Saints in Derby*, *E.* 56 *G.* 3. 90

2. Where pauper, a married man, agreed to serve *S.* for a year as a labourer, and was to have 20*l.* a-year, a house and garden, a piece of land for potatoes, the milk of a cow, and feeding of a pig, which were to run on a neighbouring field; and under this agreement the pauper served, and had the exclusive occupation of the house for himself and family, the house being about 100 yards from the house of *S.*, and being necessary for the performance of his service, and if he had not had it, he would have had more wages: Held, that this was not a coming to settle on a tenement to confer a settlement. *Rex* v. *The Inhabitants of Kelstern*, *E.* 56 *G.* 3. Page 136

SETTLEMENT BY RATE.

A person occupying, at 4*l.* a-year, part of a dwelling-house of the annual value of 18*l.*, does not, since 35 *G.* 3. *c.* 101. *s.* 4., acquire a settlement, although he be rated, and pay to the church and poor-rate for the whole house. *Rex* v. *The Inhabitants of Penryn*, *M.* 57 *G.* 3. 443

SET OFF.

1. Where damages are unliquidated and there is not a mutuality, there cannot be a set off; therefore, where plaintiff declared in covenant for a total loss on a policy of assurance effected in his own name, and averred the interest in one count to be in himself, and in another in himself and others, to which defendants pleaded that a less sum was due on the polic[illegible] than for a total loss, and set [illegible] monies due to them on plaintiff[illegible] bond, which was made to the[illegible] before they had notice that [illegible] other than plaintiff was intere[illegible] in the policy: Held, that t[illegible] pleas were ill. *Grant* v. *The R*[illegible] *Exchange Assurance Compan*[illegible] 57 *G.* 3.

2. An underwriter, in an act[illegible]

the assignees of a bankrupt assured, upon a loss which happened after the bankruptcy, may set off a sum due to him for premiums on the balance of accounts between the bankrupt and himself. *Graham and Others, Assignees of Leigh, Bankrupt,* v. *Russell, M.* 57 *G.* 3. Page 498

SHERIFF.

See Bail, 2.

STAMP.

See Bail, 2.

1. A deed executed and indorsed on a former deed, as a further securi[illegible] for advances made and to be made under the first deed, is exempted by 48 *G.* 3. *c.* 149. from an ad valorem duty, if the first deed be stamped with an ad valorem stamp. *Robinson and Others, Assignees of Clarkson and Another, Bankrupts,* v. *Macdonnell and Others, Assignees of Sharp and Others, T.* 56 *G.* 3. 228
2. A bill of sale of a ship is not void, though it omit to set forth a true consideration, and is not stamped with an ad valorem stamp; but the parties thereto are liable to a penalty. *Robinson and Others, Assignees of Clarkson and Parker, Bankrupts,* v. *Macdonnell and Others, Assignees of G. Sharp and Others, T.* 56 *G.* 3. 228
3. A valuation made of the parish lands by two resident parishioners, appointed for that purpose at a parish meeting by the parish officers, with a view of equalizing the rate to the relief of the poor, was held not to require an appraisement stamp, it being merely for the information of the parties employing the valuers. *Atkinson and Another* v. *Fell and Another, T.* [illegible] 240

STATUTES.

[illegible]

[illegible] may stop in transitu

situ before the goods come to the hands of the vendee's factor, although the factor has the bill of lading, indorsed to order, in his hands, and is under acceptance to the vendee on a general account; wherefore, in such case, where the vendee became bankrupt, and the factor also became bankrupt, and the messenger under the factor's commission, upon the arrival of the ship, went on board and seized the cargo, the agent of the vendor having previously given notice to the captain to deliver the cargo to him, and the captain having agreed thereto: Held, that trover would lie by the vendor against the assignee of the bankrupt factor. *Patten and Others* v. *Thompson*, *M.* 57 *G.* 3. Page 350

SUGGESTION OF BREACHES.

After a plea of non est factum, and that the bond was obtained by fraud and covin, where breaches are not assigned in the declaration, the plaintiff may suggest them under statute 8 and 9 *W.* 3 c. 11. in making up the issue. *Homfray and Others* v. *Rigby*, *E.* 56 *G.* 3. 60

SURRENDER.

Although a surrender of a life estate to the owner of the fee is, as between the parties, an extinguishment of the estate surrendered, yet may it have continuance to uphold a prior interest derived under it: therefore where *I. B. C.* having a lease for three lives of a manor, where, by the custom, the copyholds were demiseable by copy, made a lease for years by indenture of a copyhold tenement to defendant's father, and afterwards the estate of *I. B. C.* was surrendered to the lord of the fee, who made a lease of the manor to the lessor of the plaintiff: Held, that inasmuch as the lease to defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff should not avoid the same during the continuance of one of the three lives in the lease to *I. B. C.*, notwishstanding the surrender of that estate. *Doe dem. R. Beadon* v. *Pyke*, *E.* 56 *G.* 3. Page 146

TITHE.

Land which is of a good natural quality, shall pay tithe immediately, notwithstanding the 2 and 3 of Edward 6. c. 13., although the expence attending the breaking it up and liming it exceeds the return made to the farmer, in the several first years of cultivating it. *Warwick and Another* v. *Collins*, *T.* 56 *G.* 3. 166

TOTAL LOSS.

See Insurance, 7. Sett-off, 1.

TROVER.

1. Where plaintiffs sold goods to *T.*, who paid for them, and was to take them away, but defendant becoming possessed of the place in which the goods were deposited, plaintiffs' attorney, accompanied by *T.* demanded them of defendant, telling him that they belonged to plaintiffs, and that they had sold them to *T.*; to which defendant answered that he would not deliver them to any person whatsoever, and afterwards plaintiffs repaid the money to *T.* and brought trover against defendant: Held that this demand and refusal were sufficient evidence of a conversion to support the action, and that a new demand by the plaintiffs, after they had repaid the

money

money to T. was not necessary. *Pattison* v. *Robinson and Others*, E. 56 G. 3. Page 105

VARIANCE.

1. A bill of exchange drawn by I. S. to his own order value received means value received by the drawee, and if it be alleged in the declaration to be for value received by the said *I. S.*, it is a variance. *Highmore* v. *Primrose*, E. 56 G. 3. 65
2. In ejectment, the premises being described as in the parish of *Westbury*, and it being proved that there were two parishes of *Westbury*, viz. *Westbury* on *Trymm* and *Westbury* on *Severn*: Held, that this was not a variance. *Doe dem. James and Wife* v. *Harris*, M. 57 G. 3. 326

VENUE.

In debt upon stat. 43 G. 3. c. 84. s. 12. for wilfully absenting himself from his benefice, the venue must be laid in the county where the offence is committed. The stat. 31 *Eliz.* c. 5. extends as well to offences of omission as of commission. *Whitehead* v. *Wynn*, M. 57 G. 3. Page 427

WILL.

See Devise.

WITNESS.

One joint maker of a promissory note is a witness to prove the signature of the other. *York and Another* v. *Blott*, E. 56 G. 3. 71

END OF THE FIFTH VOLUME.

Printed by A. Strahan, Law Printer